No. _____

Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

October Term, 1998

REDBUD COMMUNITY HOSPITAL,
ADVENTIST HEALTH, INC.,

Petitioners,

vs.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA,
DAVID BURROWS, RHODA THOMAS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

HORVITZ & LEVY LLP
DAVID M. AXELRAD
MITCHELL C. TILNER
DAVID S. ETTINGER*
15760 Ventura Boulevard
18th Floor
Encino, California 91436
(818) 995-0800
Fax (818) 995-3157

Attorneys for Petitioners Redbud Community Hospital and Adventist Health, Inc.

ANDERSON, GALLOWAY & LUCCHESE
THOMAS J. DONNELLY
1676 North California
Boulevard, Suite 500
Walnut Creek, California
94596-4183
(510) 943-6383
Fax (510) 943-7542

Attorneys for Petitioner Redbud Community Hospital

**Counsel of Record*

GOLDSBERRY FREEMAN & SWANSON LLP
JOHN S. GILMORE
980 Ninth Street, Suite 1800A
Sacramento, California 95814
(916) 444-0448 • FAX (916) 446-8628

Attorneys for Petitioner Adventist Health, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

In a federal court case with claims under both California medical malpractice law and the federal Emergency Medical Treatment and Active Labor Act (EMTALA) (42 U.S.C. § 1395dd), the district court ordered the discovery of a hospital's peer review committee materials, overruling the hospital's objections that the materials are privileged. It is undisputed that California statutory law prohibits the discovery of those materials in state medical malpractice cases. Rule 501 of the Federal Rules of Evidence provides that federal common law generally governs privilege determinations, except that state privilege law applies in civil cases "with respect to an element of a claim or defense as to which State law supplies the rule of decision." The questions presented are:

1. Whether state privilege law should apply to protect hospital peer review committee materials from discovery when state interests in confidentiality outweigh federal interests in disclosure. This Court has "note[d] that there is disagreement concerning the proper rule in cases . . . in which both federal and state claims are asserted in federal court and relevant evidence would be privileged under state law but not under federal law." *Jaffee v. Redmond*, 116 S. Ct. 1923, 1931 n.15 (1996).

2. If federal privilege law applies, whether that law should bar discovery as a matter of comity between state and federal sovereignties in EMTALA cases.

QUESTIONS PRESENTED – Continued

3. If federal privilege law applies, whether that law should recognize a privilege for hospital peer review committees in EMTALA cases.

LIST OF PARTIES

Petitioners:

Redbud Community Hospital

Adventist Health, Inc.

Respondents:

David Burrows (individually and as successor-in-interest to Cody Burrows)

Rhoda Thomas

United States District Court, Northern District of California

Other Party:

Dr. Wolfgang Schug (will be separately filing a related petition for certiorari)

STATEMENT UNDER RULE 29.6

Adventist Health System/West, Inc., a California nonprofit religious corporation, dba Adventist Health, Inc. has no parent company and no subsidiaries that are not wholly owned. Redbud Community Hospital, now known as Adventist-Redbud Hospital, is owned by Adventist Health Clearlake Hospital, Inc., a California nonprofit religious corporation. Adventist Health Clearlake Hospital, Inc. is owned by Adventist Health System/West, Inc. and has no subsidiaries.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Redbud Community Hospital and Adventist Health, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 16, 1998.

OPINIONS AND ORDERS BELOW

The January 13 and May 5, 1998 opinions of the district court are unreported. They are reproduced in the appendix (hereafter cited as "App."), App. 4, 10. The June 8, 1998 order of the Court of Appeals requiring a response to the writ petition and granting a stay pending resolution of the writ petition is unreported and is reproduced at App. 23. The June 29, 1998 order of the Court of Appeals referring the writ petition to a merits panel for disposition is unreported and is reproduced at App. 25. The November 16, 1998 order of the Court of Appeals denying the writ petition after argument is unreported and is reproduced at App. 1. The December 31, 1998 order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for rehearing en banc is unreported and is reproduced at App. 27. The January 21, 1999 order of the Court of Appeals granting a stay of mandate pending a petition for writ of certiorari is unreported and is reproduced at App. 30.

JURISDICTION

The Court of Appeals' order denying the writ petition was entered November 16, 1998. The Court of Appeals' order denying the petition for rehearing was entered December 31, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Rule 501 of the Federal Rules of Evidence, California Evidence Code section 1157, and 42 U.S.C. § 1395dd are reproduced in the appendix. (App. 33-44.)

STATEMENT OF THE CASE

Plaintiffs David Burrows and Rhoda Thomas invoked the district court's jurisdiction under 42 U.S.C. § 1395dd (the Emergency Medical Treatment and Active Labor Act) (EMTALA), 28 U.S.C. § 1331 (general federal question jurisdiction), and 28 U.S.C. § 1367(a) (supplemental jurisdiction in federal question cases).

In February 1996, plaintiffs filed suit seeking damages for the death of their 11-month-old son, Cody. (Exh. at 1.)[1] They alleged that Cody was negligently treated in the emergency room of Redbud Community Hospital in

[1] References in this petition to "Exh. at" are to the consecutively paginated exhibits filed in the Court of Appeals concurrently with the writ petition of petitioners Redbud Community Hospital and Adventist Health, Inc.

Clearlake, California, and that, when he was very ill and in an unstable condition, he was discharged from the Hospital and transferred to another hospital two hours away, where he died soon after arrival. (Exh. at 2-4.) Included among the named defendants were the Hospital's owner at the time of the incident (Redbud Community Hospital District), its current owner (Adventist Health, Inc.), and Dr. Wolfgang Schug, who treated Cody in the Hospital emergency room.

Plaintiffs contended the Hospital violated EMTALA, a federal statute specifying certain steps a hospital must take when a person requests emergency medical treatment, and they sought damages under that Act. (Exh. at 6-7.) EMTALA provides that a person harmed by a violation may "obtain those damages available for personal injury under the law of the State in which the hospital is located." 42 U.S.C. § 1395dd(d)(2)(A).

Plaintiffs also pleaded counts under California law for medical negligence, violation of a criminal statute that prohibits the alteration or falsification of medical records, and violation of California statutes similar to EMTALA. Plaintiffs' count concerning the alteration or falsification of medical records was based on allegations that, after Cody's discharge from the Hospital, Dr. Schug tried to explain away his responsibility for Cody's death by destroying personal notes he had made and supplementing Cody's medical records with an "addendum" of false statements about Cody's condition and treatment.

Dr. Schug was not sued under EMTALA because the Act provides no private right of action against individual physicians. *See Eberhardt v. City of Los Angeles*, 62 F.3d

1253, 1255-57 (9th Cir. 1995). However, he was sued under plaintiffs' various state law counts.

In the course of discovery, plaintiffs sought information concerning the Hospital's medical staff peer review committees. For example, plaintiffs requested production of documents relating to investigations of Cody's treatment and to Dr. Schug's admission to the Hospital's medical staff, asked for the identity of committees and committee members who saw any version of Dr. Schug's "addendum," and inquired whether there had been peer review of Cody's treatment. (Exh. at 105, 126, 152, 203.)

The defendants objected on grounds, among others, that the information sought was protected from disclosure by California Evidence Code section 1157(a), which prohibits the discovery of "proceedings" and "records" of hospital medical staff committees "having the responsibility of evaluation and improvement of the quality of care rendered in the hospital." (Exh. at 112, 113, 133, 134, 159, 203.)

Plaintiffs moved to compel production of documents, answers to interrogatories, and answers to deposition questions. (Exh. at 13.) Defendants opposed the motion. (Exh. at 252, 333, 346.) The district court ruled section 1157 inapplicable to the present action. (App. 4.) The court acknowledged that it was an issue "of first impression" (App. 6) whether state law supplies the rule of decision in an EMTALA case for purposes of Rule 501 of the Federal Rules of Evidence, which provides that the existence of a privilege is generally determined according to federal common law, except state law applies in civil cases "with respect to an element of a claim or defense as

to which State law supplies the rule of decision." The court concluded federal law applied.

Although ruling state privilege law did not have to be applied, the district court stated that it should apply the discovery prohibition of California's section 1157 as a matter of comity if it would not be inconsistent with federal law. Relying on an opinion in which a district court declined to apply section 1157 in an antitrust case (*Pagano v. Oroville Hosp.*, 145 F.R.D. 683 (E.D. Cal. 1993)), the district court here "decline[d] to apply § 1157." (App. 9.)

The defendants moved for reconsideration. (Exh. at 443, 466, 582, 606.) In its reconsideration motion, the Hospital argued that discovery was improper under either state or federal law. Alternatively, it asked for a protective order, requesting that discovery, if allowed, be delayed or limited. (Exh. at 613-17.) The Hospital suggested delaying discovery until plaintiffs explained in greater detail how the Hospital's peer review process was involved in the claims plaintiffs were asserting (Exh. at 614-15) and it proposed that the court review the sensitive peer review committee materials *in camera* for relevancy before disclosing them to plaintiffs (Exh. at 615-16).

In an opinion upon reconsideration, the district court ruled that the Hospital peer review committee records were discoverable, subject only to a protective order ensuring the privacy of physicians other than Dr. Schug. (App. 10.) The court concluded categorically that federal privilege law applies to state law claims in federal question cases. (App. 14.) The court also rejected the argument that, because the alleged EMTALA violation did not occur

in the peer review process, section 1157 should apply. The court noted that committee records are not protected "when the plaintiff's claim arises out of the disciplinary proceedings themselves" and ruled that, "to the extent plaintiffs allege Dr. Schug may have been instructed to create the addendum and burn his notes at the peer review meeting, plaintiffs' claim for spoliation of evidence and EMTALA depend on communications made during the peer review proceedings." (App. 15-16.) The court did not state why it would not delay discovery until plaintiffs explained in greater detail how the Hospital's peer review process was involved in the claims plaintiffs were asserting, nor did it say why it would not conduct an *in camera* review of the documents.

The Hospital and Adventist jointly petitioned the Ninth Circuit Court of Appeals for writ relief under the All Writs Statute (28 U.S.C. § 1651). Dr. Schug separately petitioned for writ relief and also appealed from the district court's discovery order. A motions panel of the Court of Appeals granted a stay pending resolution of the writ petitions (App. 23) and referred the writ petitions to a merits panel for disposition (App. 25). After full briefing and oral argument, the court denied the writ petitions with no reasons stated other than a citation to *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977), which provides generally the criteria for writ relief. (App. 1.) The court also dismissed Dr. Schug's appeal for lack of jurisdiction. After denying a petition for rehearing and rejecting a suggestion for rehearing en banc (App. 27), the court granted a stay of mandate pending a petition for writ of certiorari (App. 30).

REASONS FOR GRANTING THE WRIT

THIS CASE RAISES UNRESOLVED PRIVILEGE LAW ISSUES THAT AFFECT A CRITICAL PUBLIC HEALTH POLICY ADOPTED BY ALL 50 STATE LEGISLATURES.

A. The Discovery Ordered Contravenes Unanimous State Policy In Favor Of Protecting The Confidentiality Of Hospital Peer Review Committee Matters.

It is undisputed that plaintiffs' discovery demand would have been barred had they filed their case in California state court. With exceptions not here relevant, California Evidence Code section 1157(a) provides that "[n]either the proceedings nor the records of organized committees of medical . . . staffs in hospitals . . . having the responsibility of evaluation and improvement of the quality of care rendered in the hospital . . . shall be subject to discovery." Section 1157 reflects a crucial state policy to promote effective hospital peer review proceedings by protecting the confidentiality of those proceedings. The same policy has been adopted by all 50 states.[2]

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[2] All 50 states and the District of Columbia recognize a hospital peer review privilege: ALA. CODE § 22-21-8 (1997); ALASKA STAT. §§ 18.23.030, 18.23.070 (Michie 1997); ARIZ. REV. STAT. § 36-445.01 (1997); ARK. CODE ANN. §§ 20-9-304, 20-9-503 (Michie 1997); CAL. EVID. CODE § 1157 (Deering 1997); COLO. REV. STAT. § 13-21-110 (1997); CONN. GEN. STAT. § 19a-17b (1997); DEL. CODE ANN. tit. 24, § 1768 (1997); D.C. CODE ANN. § 32-505 (1997); FLA. STAT. ch. 766.101 (1997); GA. CODE ANN. §§ 31-7-133, -140, -143 (1997); HAW. REV. STAT. § 624-25.5 (1997); IDAHO CODE §§ 39-1392, 39-1392a-f (1997); 225 ILL. COMP. STAT. ANN. 60/5, 735 ILL. COMP. STAT. ANN. 5/8-2101 (West 1997); IND. CODE ANN. §§ 34-30-15-1 to -3, -8, -9 (Michie 1998); IOWA CODE § 147.135 (1997); KAN. STAT. ANN. § 65-4915 (1997); KY. REV. STAT. ANN. § 311.377 (Michie 1996); LA. REV. STAT. ANN. § 13:3715.3 (West

Justice Souter, then of the New Hampshire Supreme Court, ten years ago explained why the states have so acted:

> The reason for seeking enactment of [the New Hampshire statute], and its counterparts in other jurisdictions, was the natural reluctance of hospital employees and staff members to engage in [the] evaluation [of the quality and appropriateness of patient care and clinical performance] after the fact, by furnishing information and voicing critical judgments, if in so doing they would also be compiling a fund of material

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1998); ME. REV. STAT. ANN. tit. 32, § 3296 (West 1997); MD. CODE ANN., HEALTH OCC. §§ 14-501, 14-503 (1997); MASS. ANN. LAWS ch. 111, § 204 (Law. Co-op. 1998); MICH. STAT. ANN. § 14.15 (21515) (Law. Co-op. 1998); MINN. STAT. § 145.64 (1997); MISS. CODE ANN. § 41-63-9 (1997); MO. REV. STAT. § 537.035 (1997); MONT. CODE ANN. §§ 37-2-201, 50-16-201 to -205 (1997); NEB. REV. STAT. ANN. §§ 71-2046 to -2048 (Michie 1997); NEV. REV. STAT. ANN. § 49.265 (Michie 1997); N.H. REV. STAT. ANN. §§ 151:13-a, 329:29 (1997); N.J. STAT. ANN. § 2A:84A-22.8 (West 1997); N.M. STAT. ANN. § 41-9-5 (Michie 1997); N.Y. EDUC. LAW § 6527 (Consol. 1998); N.C. GEN. STAT. § 131E-95 (1997); N.D. CENT. CODE §§ 23-34-01 to -03 (1997); OHIO REV. CODE ANN. §§ 2305.251, 2305.252 (Anderson 1998); OKLA. STAT. tit. 63, § 1-1709 (1997); OR. REV. STAT. § 41.675 (1997); PA. STAT. ANN. tit. 63, §§ 425.2, 425.4 (West 1997); R.I. GEN. LAWS § 5-37.3-7 (1997); S.C. CODE ANN. §§ 40-71-10, -20 (Law. Co-op. 1997); S.D. CODIFIED LAWS § 36-4-26.1 (Michie 1998); TENN. CODE ANN. § 63-6-219 (1997); TEX. REV. CIV. STAT. ANN. art. 4495b (West 1998); UTAH CODE ANN. §§ 26-25-1, -3 (1997); VT. STAT. ANN. tit. 26, §§ 1441, 1443 (1997); VA. CODE ANN. § 8.01-581.17 (Michie 1997); WASH. REV. CODE ANN. § 4.24.250 (West 1997); W. VA. CODE § 30-3C-3 (1997); WIS. STAT. § 146.38 (1997); WYO. STAT. ANN. § 35-17-105 (Michie 1997).

> discoverable by adverse parties in any subsequent litigation against the hospital. State legislatures were accordingly asked to advance the general public interest in promoting a hospital's vigorous self-criticism by immunizing its process and products from discovery by a particular litigant.

In re "K", 561 A.2d 1063, 1067 (N.H. 1989) (citations omitted).

California's experience confirms Justice Souter's observations. The importance of hospital medical staff committees to health care in California hospitals cannot be overstated. This is apparent from the state law requirements that make the committees responsible for investigating and evaluating the competency of physicians who wish to practice at California hospitals. *See Alexander v. Superior Court*, 859 P.2d 96, 99, 23 Cal. Rptr. 2d 397, 400 (1993). Peer review committees have been accurately termed "quasi-public functionar[ies]." *People v. Superior Court (Memorial Medical Center)*, 286 Cal. Rptr. 478, 483 (Ct. App. 1991). It is thus not surprising that California has " 'a strong public interest in supporting, encouraging and protecting effective medical peer review programs and activities.' " *California Eye Inst. v. Superior Court*, 264 Cal. Rptr. 83, 86 (Ct. App. 1989).

Section 1157 was enacted to promote this "strong public interest." By prohibiting the discovery of peer review committee "records" and "proceedings," the statute serves the purpose of "assur[ing] thorough evaluation of the quality of patient care by the members of the medical staff who are responsible for that review." *County of Los Angeles v. Superior Court*, 274 Cal. Rptr. 712, 716 (Ct.

App. 1990). The importance of section 1157 to the effective functioning of the peer review committee system was explained in the seminal decision of *Matchett v. Superior Court*, 115 Cal. Rptr. 317, 320 (Ct. App. 1974), an explanation endorsed by the California Supreme Court in *Alexander*, 859 P.2d at 99, 23 Cal. Rptr. 2d at 400 and *West Covina Hosp. v. Superior Court*, 718 P.2d 119, 122-23, 226 Cal. Rptr. 132, 135-36 (1986):

> When medical staff committees bear delegated responsibility for the competence of staff practitioners, the quality of in-hospital medical care depends heavily upon the committee members' frankness in evaluating their associates' medical skills and their objectivity in regulating staff privileges. Although composed of volunteer professionals, these committees are affected with a strong element of public interest.
>
> . . . Section 1157 was enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. It evinces a legislative judgment that the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality.

(Footnote omitted.)

B. Important Privilege Law Issues Are Presented.

1. This Court should resolve the "disagreement" that it noted exists "concerning the proper rule in cases . . . in which both federal and state claims are asserted in federal court and relevant evidence would be privileged under state law but not under federal law."

In federal court, privilege determinations are "governed by the principles of [federal] common law," except that state privilege law applies in civil cases "with respect to an element of a claim or defense as to which State law supplies the rule of decision." Fed. R. Evid. 501. The district court in this case refused to apply California's crucially important hospital peer review committee privilege simply because both state law claims and a federal claim under EMTALA are at issue – the court categorically declared "state law claims that are pendent to federal question cases are governed by federal privilege law." (App. 14.) But it is not nearly so cut and dried.

This Court recently recognized that the issue so unhesitatingly dispatched by the district court is in fact unresolved. In *Jaffee v. Redmond*, 116 S. Ct. 1923 (1996), the Court held that a psychotherapist privilege under federal law barred a plaintiff's discovery demand. The Court explained, however, that had there been no federal privilege, an open question would have been presented regarding the applicability of a state psychotherapist privilege because the plaintiff there was asserting both a wrongful death claim under state law and a federal section 1983 claim:

> We note that there is disagreement concerning the proper rule in cases such as this in which

> both federal and state claims are asserted in federal court and relevant evidence would be privileged under state law but not under federal law. See C. Wright & K. Graham, 23 Federal Practice and Procedure, § 5434 (1980). Because the parties do not raise this question and our resolution of the case does not depend on it, we express no opinion on the matter.

Jaffee, 116 S. Ct. at 1931 n.15.

The issue not decided in *Jaffee* is presented here. The parties have raised and extensively briefed the issue, and the district court's refusal to apply the California privilege was based on its specific ruling that state law privileges do not apply to state law claims in federal question cases. Also, the issue is determinative of this case, unless, as in *Jaffee*, a privilege is recognized as a matter of federal law, but that raises additional unresolved questions meriting this Court's attention, which we discuss in following sections.

Besides the need to resolve the "disagreement" identified in *Jaffee*, certiorari is necessary to prevent categorical rejection of state law privileges in federal question cases with pendent state law claims. Under such a rule, as happened in this case, critical state policies are sacrificed with little or no corresponding benefit to federal interests. There is a better alternative.

The treatise cited by the *Jaffee* Court states that because an authoritative Congressional report "says that federal privilege law will '*generally* apply' in nondiversity cases, it must be assumed that Congress recognized that state privilege law would apply in at least some cases in which the jurisdiction of the court was premised on some

federal interest." C. Wright & K. Graham, 23 Federal Practice and Procedure, § 5433 at 857 (1980) (footnotes omitted) (emphasis added). Later, after discussing several answers to the question of which law applies, including the rote answer provided by the district court here, the text advocates a case-by-case approach:

> Perhaps the best rule would be to have no rule and to resolve questions of conflicting privileges on an ad hoc basis. In each case in which the issue arises, courts should try to balance the state and federal interest in the context of the particular law suit. Relevant factors include the nature of the privilege being asserted, the identity of the person claiming the privilege, the relative importance of the state and federal issues to the law suit, the existence of alternate forms of proof and the need for the evidence claimed to be privileged, the nature of the conflict between state and federal rules and other similar factors. This ad hoc balancing seems more likely to comport with the underlying policy of Rule 501 than any of the categorical tests.

Id., § 5434 at 863-64 (footnotes omitted).

This case affords the Court an excellent opportunity to approve and apply the balancing analysis. In this and the many other EMTALA lawsuits filed around the country, a balancing of interests weighs strongly in favor of respecting the state law hospital peer review privilege. As noted, the state interest in protecting the confidentiality of peer review matters is great. On the other hand, little if any harm will come to federal policy by honoring the state interest. Indeed, doing so is consistent with federal policy.

First, a plaintiff attempting to establish an EMTALA violation has little need to discover peer review matters, so denial of discovery impairs no federal interest. EMTALA concerns patient treatment – it "places obligations of screening and stabilization upon hospitals and emergency rooms who receive patients suffering from an 'emergency medical condition.' " *Roberts v. Galen of Virginia, Inc.*, 119 S. Ct. 685, 685 (1999). Hospital peer review committees do not treat patients; rather, they evaluate patient treatment after the fact. Thus, an EMTALA violation can occur only in a patient's treatment (or lack of treatment), not later in the peer review process. Moreover, discovery of peer review matters will reveal the details of a review based on evidence, such as medical records, that is readily available to plaintiffs. The plaintiffs, or experts they retain, can conduct their own evaluation of the evidence they gather. As Justice Souter wrote for the New Hampshire Supreme Court, a statutory protection of peer review documents "simply leaves certain potential malpractice plaintiffs in the position of any litigant, or intending litigant, who cannot depend on the luxury of relying on the opposing party to furnish pretrial investigation and preliminary expert evaluation." *In re "K"*, 561 A.2d at 1072.

Second, application of a state law privilege is consistent with Congressional intent in enacting EMTALA. State law was not meant to be a stranger to EMTALA actions. To the contrary, Congress deferred to state law in important respects. Congress provided generally that EMTALA's provisions "do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with [an EMTALA requirement]."

42 U.S.C. § 1395dd(f); *see Draper v. Chiapuzio*, 9 F.3d 1391, 1393 (9th Cir. 1993) (construing the "preemptive effect [of 1395dd(f)] as narrowly as possible"; "The key phrase is 'directly conflicts' "; applying Oregon notice of a claim requirement); *see also Hardy v. New York City Health & Hospitals Corp.*, 164 F.3d 789 (2d Cir. 1999) (applying New York notice-of-claim law); *Power v. Arlington Hosp. Ass'n*, 42 F.3d 851, 863-64 (4th Cir. 1994) (applying state limitation on amount of damages recoverable in medical malpractice actions). Here, section 1157 is not in direct conflict with any EMTALA provision. Further, in Rule 501 terms, state law *does* "suppl[y] the rule of decision" for "an element of a[n] [EMTALA] claim." That element is damages – EMTALA expressly directs that *state law* governs what damages plaintiffs may recover (42 U.S.C. § 1395dd(d)(2)(A)).

Finally, federal law itself expressly recognizes the importance of confidentiality in hospital peer review proceedings. For example, Congress has made Defense Department medical quality assurance records "confidential and privileged" (10 U.S.C. § 1102(a)) for much the same reasons that state legislatures enacted hospital peer review privileges. *See In re United States*, 864 F.2d 1153, 1154 (5th Cir. 1989). Also, regarding EMTALA specifically, before the federal government will impose sanctions for an EMTALA violation, a peer review organization will conduct an investigation and prepare a report (42 U.S.C. § 1395dd(d)(3)) and that organization's materials are expressly protected from subpoena or discovery in civil proceedings (42 U.S.C. § 1320c-9(d)).

2. This Court should resolve the conflict whether federal law can recognize state privileges as a matter of comity, and if so, this Court should decide the first impression issue whether comity requires application of state hospital peer review privileges in EMTALA lawsuits.

Even if federal privilege law does apply in cases like this one, important unresolved issues still remain. A number of federal courts have used a balancing analysis similar to the one discussed above in deciding whether federal law should recognize a state hospital peer review privilege as a matter of comity. The validity of this analysis is in dispute, however, and the analysis has never been applied in an EMTALA case.

The courts are in conflict over whether it is appropriate at all to use principles of comity to determine federal privilege law. The district court here believed it is (although ultimately concluding the balance of interests required that the state privilege not be recognized) and there is solid precedent for that approach. Courts looking to comity principles have expressed concern about unnecessarily "subject[ing] the citizens of [a] jurisdiction to a double standard of confidentiality and privacy depending on [whether a state or federal] court hears a particular case." *United States v. Illinois*, 148 F.R.D. 587, 590 (N.D. Ill. 1993). As explained in a leading Court of Appeals opinion:

> A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal

> substantive and procedural policy. And where a state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule.

Memorial Hosp. for McHenry County v. Shadur, 664 F.2d 1058, 1061 (7th Cir. 1981) (citations and internal quotation marks omitted); *see also, e.g., Weekoty v. United States*, 30 F.Supp.2d 1343, 1347 (D. N.M. 1998); *Mercado v. Division of New York State Police*, 989 F.Supp. 521, 522 (S.D. N.Y. 1998); *Holland v. Muscatine Gen. Hosp.*, 971 F.Supp. 385, 389 (S.D. Iowa 1997).

But other courts have rejected comity as a factor in federal privilege law. These courts, too, are concerned about inconsistent privilege laws. It is not inconsistencies between state and federal privilege law within a jurisdiction that troubles these courts, however, but the potential for inconsistencies in federal privilege law across the country. In *Johnson v. Nyack Hosp.*, 169 F.R.D. 550, 558 (S.D. N.Y. 1996), for example, the court stressed the need for an "informed determination of a single, uniform federal law of evidentiary privileges." The court spoke against using principles of comity, calling it a rule under which "parties similarly situated in all respects save the location of the federal court in which they happen to be litigating would be faced with a real possibility of different outcomes based purely on that geographical happenstance." *Id.* at 559; *see also Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F.Supp.2d 1164, 1170 (C.D. Cal. 1998) (interpreting this Court's opinion in *Jaffee v. Redmond* as overruling those cases that look to the law of the forum state as a matter of comity).

Should federal courts avoid those inconsistencies in privilege law that exist "depending on [whether a state or federal] court hears a particular case" (*United States v. Illinois*, 148 F.R.D. at 590) or those that exist depending on "the location of the federal court in which [parties] happen to be litigating" (*Johnson v. Nyack Hosp.*, 169 F.R.D. at 559)? It is an important question affecting federal privilege law generally and this case presents an excellent opportunity to answer it.

If a comity analysis retains vitality, a question of first impression arises – whether that analysis requires recognition of a state hospital peer review privilege in an EMTALA lawsuit. Under comity principles, federal courts have barred discovery of hospital peer review materials in some types of cases and allowed it in others, but no published decision addresses the discoverability of those materials in EMTALA actions.

State hospital peer review privilege statutes are normally disregarded in federal question cases where barring discovery would threaten enforcement of federal law, as in antitrust or civil rights cases where the peer review process *itself* has been used for anticompetitive or discriminatory purposes. Otherwise, however, federal courts usually *do* apply the state discovery privilege to protect the crucial state interest in promoting effective hospital peer review. The distinction was well summarized in *Wei v. Bodner*, 127 F.R.D. 91, 101 (D. N.J. 1989):

> In malpractice actions . . . , the issue is not what transpired during the evaluative process. Rather, it is whether there was negligence. In

> contrast, in an antitrust action where a physician is suing a hospital and others for anticompetitive actions, the claim arises directly from that process. In the former type of situation, *where the evaluative process is the source of information to support a claim independent of the review process, the privilege should prevail and disclosure should not be ordered.* Where . . . the party seeking discovery seeks redress from the evaluative process itself, the privilege must fall in favor of greater interests.

(emphasis added) (citations omitted); *see Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d at 1062-63.

This reasoning supports a protection from discovery in EMTALA cases. As discussed in the preceding section, EMTALA cases are ones where "the evaluative process is the source of information to support a claim *independent of the review process*" and thus where the state law privilege "should prevail and disclosure should not be ordered" (*Wei*, 127 F.R.D. at 101 (emphasis added)). In EMTALA cases, as in malpractice actions, the issue is the treatment of a patient – not the use of the peer review process against a physician for anticompetitive or discriminatory purposes. The peer review process is not on trial; rather, it is merely a potential source of secondary evidence available from other sources.

3. This Court should resolve the conflict whether a federal privilege for hospital peer review exists and, if it does exist, this Court should decide the first impression issue whether that privilege applies in an EMTALA action.

If a state hospital peer review privilege does not apply, either directly or as a matter of comity, a privilege can be found under "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience" (Fed. R. Evid. 501). Whether such a privilege exists at all is an issue dividing the lower courts nationwide. If the privilege exists, whether it applies in an EMTALA case is a question of first impression.

Some courts have flatly stated, "[F]ederal law now recognizes a privilege protecting hospital peer review records from disclosure during discovery." *Whitman v. United States*, 108 F.R.D. 5, 7 (D. N.H. 1985); *see Weekoty v. United States*, 30 F.Supp.2d 1343; *Freeman v. Fairman*, 917 F.Supp. 586, 588-89 (N.D. Ill. 1996); *Brem v. DeCarlo, Lyon, Hearn & Pazourek, P.A.*, 162 F.R.D. 94, 101-02 (D. Md. 1995); *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249 (D. D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973). As one court recently concluded, recognition of such a privilege is compelled by "the 'overwhelming public interest' in providing physicians with a confidential context in which to evaluate the effectiveness of life-saving techniques and procedures. . . . " *Weekoty*, 30 F.Supp.2d at 1347-48.

Other courts have come to the opposite conclusion. For example, one court stated, "Medical peer reviews do not enjoy the historical or statutory support upon which

other privileges have been recognized in federal law, and the Hospitals have failed to provide any reason to believe some physicians would not provide candid appraisals of their peers absent the asserted privilege." *Syposs v. United States*, 179 F.R.D. 406, 411-12 (W.D. N.Y. 1998); *see Johnson v. Nyack Hosp.*, 169 F.R.D. at 559-61; *Robertson v. Neuromedical Ctr.*, 169 F.R.D. 80, 83-84 (M.D. La. 1996).

The conflict concerning the existence *vel non* of a federal hospital peer review privilege is a subset of a broader unsettled issue – the status of a self-critical analysis privilege in federal law. In *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992), a Court of Appeals noted that "[t]he Supreme Court and the circuit courts have neither definitively denied the existence of such a privilege, nor accepted it and defined its scope." *Id.* at 425 n.1; *see also Holland v. Muscatine Gen. Hosp.*, 971 F.Supp. at 390 ("The self-critical analysis privilege has had an ambiguous existence, neither uniformly adopted nor rejected"). Guidance from this Court is needed regarding both the self-critical analysis privilege generally and the hospital peer review privilege specifically.

Perhaps the most telling sign that this Court's pronouncements to date are inadequate to determine the privilege issue presented by this case is that the lower courts are interpreting the Court's two most recent privilege opinions (*Jaffee v. Redmond*, 116 S. Ct. 1923, and *University of Pennsylvania v. Equal Employment Opportunity Comm'n*, 493 U.S. 182 (1990)) variously as supporting and opposing the recognition of a hospital peer review privilege. The inconsistent application of the same precedents calls for this Court's attention.

All 50 states and the District of Columbia recognize a hospital peer review privilege. *See* n.2, *ante*. When this Court recognized a federal psychotherapist privilege in *Jaffee*, it was influenced by the States having enacted such a privilege by statute, stating that "the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one." *Jaffee*, 116 S. Ct. at 1929-30. The Court explained:

> Because state legislatures are fully aware of the need to protect the integrity of the factfinding functions of their courts, the existence of a consensus among the States indicates that "reason and experience" support recognition of the privilege. In addition, given the importance of the patient's understanding that her communications with her therapist will not be publicly disclosed, any State's promise of confidentiality would have little value if the patient were aware that the privilege would not be honored in a federal court. Denial of the federal privilege therefore would frustrate the purposes of the state legislation that was enacted to foster these confidential communications.

Id. at 1930 (footnote omitted).

The same considerations militate in favor of a privilege here. There is the same "consensus among the States" in favor of a privilege, and the important public policy underlying California's protection for peer review committees would be frustrated if the persons participating in those committees knew that a plaintiff's pleading of an EMTALA claim in federal court would negate the protection. This reasoning has been found compelling in

some cases (*see Weekoty*, 30 F.Supp.2d at 1346-47), but not in others (*see Johnson*, 169 F.R.D. at 559 n.14 ("detailed consideration of the experience of the fifty states unnecessary" because of reasoning of *University of Pennsylvania* opinion).

Courts finding no federal hospital peer review privilege often rely on *University of Pennsylvania v. Equal Employment Opportunity Comm'n*, 493 U.S. 182, which held there is no federal privilege for academic peer review. *See Johnson*, 169 F.R.D. at 559. Other courts, however, reach the opposite result, finding a difference between hospital and academic peer review. *See Weekoty*, 30 F.Supp.2d at 1345 ("Because of [their] unique role in preserving the public health, medical morbidity and mortality reviews must be distinguished from other peer review cases"); *see also United States v. Harris Methodist Fort Worth*, 970 F.2d 94, 103 (5th Cir. 1992) ("Unlike the privilege claim for faculty tenure decisions rejected in *University of Pennsylvania v. EEOC* . . . the medical peer review process 'is a *sine qua non* of adequate hospital care' ").

Regardless of the validity of the district court's ruling here, the issues presented in this case are undeniably important ones. The issues concern public health care policy of the States and privilege law in federal actions. Until this Court addresses the issues, the lower courts will continue as they have been, on divergent paths, unable to state consistent rules on which federal litigants in general and the medical community in particular can rely with certainty.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

HORVITZ & LEVY LLP
DAVID M. AXELRAD
MITCHELL C. TILNER
DAVID S. ETTINGER
15760 Ventura Boulevard
18th Floor
Encino, California 91436

ANDERSON, GALLOWAY & LUCCHESE
THOMAS J. DONNELLY
1676 North California Boulevard
Suite 500
Walnut Creek, California
94596-4183

GOLDSBERRY FREEMAN & SWANSON LLP
JOHN S. GILMORE
980 Ninth Street, Suite 1800A
Sacramento, California 95814

Attorneys for Petitioners
Redbud Community Hospital
and Adventist Heatlh, Inc.

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In Re: REDBUD COMMUNITY HOSPITAL DISTRICT,	No. 98-70610 D.C. No. CV-96-04345-SI
REDBUD COMMUNITY HOSPITAL, ADVENTIST HEALTH, INC., Petitioner [sic], v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, Respondent, and DAVID BURROWS, Successor-In-Interest to Cody Burrows, Deceased; DAVID BURROWS and RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows, Real Party [sic] in Interest.	(Filed NOV. 16, 1998)
WOLFGANG SCHUG, M.D., Petitioner, v. UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, Respondent,	No. 98-70616 D.C. No. CV-96-04345-SI

and

DAVID BURROWS, Successor-In-Interest to Cody Burrows, Deceased; DAVID BURROWS and RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,

Real Party [sic] in Interest.

DAVID BURROWS, Successor-In-Interest; CODY BURROWS, Deceased; RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,

Plaintiffs-Appellees,

v.

REDBUD COMMUNITY HOSPITAL DISTRICT; M. FRED BREWER; ADVENTIST HEALTH INC.; JJ&R EMERGENCY MANAGEMENT GROUP INC.; EMERGENCY MEDICAL MANAGEMENT SERVICES, INC.,

Defendants,

and

WOLFGANG SCHUG, M.D.,

Defendant-Appellant.

No. 98-16089

D.C. No. CV-96-04345-SI

ORDER*

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*This disposition is not appropriate for publication and may not be cited to or by the courts in this circuit except as provided by Ninth Circuit Rule 36-3.

Appeals from the United States District Court
for the Northern District of California
Susan Yvonne Illston, District Judge, Presiding

Argued and Submitted October 7, 1998
San Francisco, California

Before: HUG, Chief Judge, FLETCHER, and TROTT, Circuit Judges.

Dr. Schug's appeal is dismissed for lack of jurisdiction. *See In re National Mortgage Equity Corp. Mortgage Pool Certificates Litigation*, 857 F.2d 1238, 1240 (9th Cir. 1988). The consolidated petitions for writs of mandamus are denied. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID BURROWS, et al.,

Plaintiffs,

v.

REDBUD COMMUNITY HOSPITAL DISTRICT, et al.,

Defendants.

_____/

No. C 96-4345 SI

ORDER REGARDING APPLICABILITY OF CALIFORNIA EVIDENCE CODE § 1157

(Filed Jan. 13, 1998)

In their objections to a number of plaintiffs' discovery requests, defendants Redbud and Adventist raised claims of privilege under California Evidence Code § 1157, which substantially limits discovery into the proceedings and records of hospital medical staffs concerned with evaluation and improvement of the quality of care in a hospital. During an earlier discovery conference, plaintiffs sought to compel responses to the challenged discovery requests, contending that the limitations imposed on California courts by § 1157 do not apply in federal court.

Plaintiffs' then-pending discovery disputes were partially resolved by this Court's order filed November 3, 1997. However, at that time Superior Court Judge Warren had under submission the question of whether Evidence Code § 1157 applied in the state criminal case pending against Dr. Schug: prosecutors were seeking, and defendant Schug was resisting, production of such records. In

the interest of protecting Dr. Schug's right to a fair criminal trial, this Court refrained from ruling on the applicability of § 1157 in the federal context until the state court had issued its ruling on the matter.

On January 2, 1998, Judge Warren issued a ruling, holding § 1157 was inapplicable in the criminal context presented there, thereby allowing prosecutors to subpoena hospital records claimed to be privileged under § 1157. *In re Search Warrant No. 13489*, San Francisco Superior Court, 1/2/98. Given Judge Warren's ruling, this Court is no longer constrained by the impact its ruling on this issue might have on Dr. Schug's state criminal case.

For the following reasons, the Court concludes that § 1157 is not applicable in this action.

DISCUSSION

Section 1157 provides that proceedings and records of hospital medical staffs concerned with evaluation and improvement of the quality of care in the hospital shall not be subject to discovery. California Evidence Code § 1157 (West 1997). The section further states that no person who attends a meeting of these committees shall be required to testify as to what transpired at that meeting. *Id.*

The existence of privileges in cases in federal court is governed by Rule 501 of the Federal Rules of Evidence, which provides:

> [T]he privilege of a witness, person, government, State, or political subdivision thereof shall

> be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof, shall be determined in accordance with State law.

Defendants assert that § 1157 applies in this action because of [sic] the Emergency Medical Treatment and Active Labor Act of 1986 ("EMTALA"), 42 U.S.C. § 1395dd, incorporates state damages law to the extent that plaintiffs are allowed to "obtain those damages available for personal injury under the law of the state in which the hospital is located." 42 U.S.C. § 1395dd(d)(2)(A). Defendants argue that state law therefore provides the rule of decision, and thus state privilege law governs. Plaintiffs counter that § 1157 is inapplicable in a federal question case such as the instant action, and that when federal and state claims are joined in the same action, claims of privilege are determined under federal law. *See William T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 104 (3d Cir. 1982).

This issue appears to be one of first impression. Plaintiffs are correct that ordinarily federal privilege law applies in federal question cases. However, EMTALA is unlike many federal laws in that it incorporates state law, thus requiring a different analysis of the issue than that put forth by plaintiffs.

Other courts have faced a question similar to that presented here when applying state privileges to federal

actions under the Federal Tort Claims Act. The Federal Torts Claim Act requires federal courts to look to the law of the state where the act or omission occurred in order to determine government liability. 28 U.S.C. § 1346(b). Thus, the Federal Tort Claims Act, like EMTALA, incorporates state tort law to some extent. In *Menses v. United States Postal Services*, 942 F.Supp. 1320 (D. Nev. 1996), the court held that the incorporation of state law did not mean that "state law supplies the rule of decision" for purposes of FRE 501. *Accord Young v. United States*, 149 F.R.D. 199 (S.D. Cal. 1993). In reviewing the legislative history of FRE 501, the *Menses* court stated, "Congress recognized that when federal courts merely adopt state law as federal law, there is no need to apply state law in matters such as the admissibility of evidence and claims of privilege, and that federal privilege law controls. It is only where state law is operative of its own force that state law supplies the rule of decision, and, under Rule 501, state privilege law governs." *Id.* at 1322. A state law is self-operative if state law provides the source of the right sued upon. In these cases, "no federal interest justifies overriding a state substantive law such as evidentiary privileges, and to do so would promote forum shopping and lead to an inequitable administration of the laws between state and federal courts." *Id.* In contrast, if the right sued upon has a federal source, then state law is incorporated or adopted as federal law, and federal interests in applying federal evidence rules and privileges outweigh any countervailing state interests.

The Court concludes that FRE 501 does not require the application of § 1157 to the instant action. In an EMTALA action, state substantive law is not operative of

its own force. Rather, EMTALA establishes federal requirements for medical screening, stabilizing treatment, and restriction of transfers until the patient is stabilized. 42 U.S.C. § 1395dd(a)-(c). The statute creates a private right of action under *federal law* against offending hospitals, and incorporates state law only in the determination of damages.

Although federal courts are not required to apply state privileges law to federal questions cases, federal courts may do so in the interest of comity. "[A]s a matter of comity, federal courts should attempt to ascertain what interests inspire relevant state doctrine and should take into account the views of state authorities about the importance of those interests." *Kelly v. City of San Jose,* 114 F.R.D. 653, 656 (N.D. Cal. 1987). In determining whether to apply a state privilege, a federal court should first analyze whether application of the state law would be inconsistent with federal law. *See Pagano v. Oroville Hospital,* 145 F.R.D. 683, 688 (N.D. Cal. 1993). If the state law is not inconsistent, the federal court should attempt to apply the state privilege in harmony with federal privileges law.

In *Pagano v. Oroville Hospital,* the court declined to apply § 1157 to a federal antitrust action, finding there is no clearly recognized federal peer review privilege and that § 1157 is too absolute in its application and effect, and therefore too inconsistent with federal law, to be applicable. *Id.* at 690. The court reasoned that disclosure in that case was necessary because the evidence sought was relevant to the plaintiff's allegations that the hospital had conspired to eliminate the plaintiff as a competitor in providing medical services.

The Court finds the *Pagano* court's reasoning instructive, and declines to apply § 1157 to the instant case. Section 1157 acts as an absolute shield against discovery, and this Court agrees with the *Pagano* court that such absolute protection against discovery is inconsistent with the flexibility of federal privilege law. Plaintiffs have alleged that defendants conspired to falsify Cody Burrows' medical records, and that the evidence they are seeking – to which defendants have raised claims of privilege under § 1157 – is relevant to their spoliation of evidence claim. As a general matter, the Court finds that such evidence may be relevant to this claim, and holds that § 1157 is inapplicable in this action. Defendants may, of course, raise other claims of privilege to these documents if applicable.

IT IS SO ORDERED.

Dated: January 9, 1998

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DAVID BURROWS and RHODA THOMAS,

Plaintiffs,

v.

REDBUD COMMUNITY HOSPITAL DISTRICT; ADVENTIST HEALTH INC.; JJ. & R. EMERGENCY MANAGEMENT GROUP, INC.; WOLFGANG SCHUG, M.D.; M. FRED BREWER, M.D. and DOES I through XXX.

Defendants.

_____/

No. C 96-4345 SI

(Filed MAY 5, 1998)

ORDER:

1. **DENYING PLAINTIFFS' MOTION TO STRIKE EX PARTE COMMUNICATIONS;**
2. **DENYING PLAINTIFFS' MOTION FOR SANCTIONS;**
3. **DENYING IN PART AND GRANTING IN PART DEFENDANTS' MOTION FOR RECONSIDERATION; and**
4. **RESOLVING PENDING DISCOVERY DISPUTES**

INTRODUCTION

Cody Burrows, an eleven-month old infant, died after being transferred from Redbud Community Hospital to Santa Rosa Community Hospital. David Burrows and

Rhoda Thomas, Cody's parents, filed this lawsuit in federal court alleging violations of the federal Emergency Medical Treatment and Active Labor Act ("EMTALA"), as well as pendant state law claims for medical malpractice, wrongful death, emotional distress, and spoliation of evidence.

Defendants have requested reconsideration of this Court's "Order Regarding Applicability of California Evidence Code § 1157" filed January 13, 1998, in which the Court held that the state peer review privilege did not apply in the instant case. At issue were plaintiffs' discovery requests for documents produced during hospital peer review sessions after Cody Burrows' death. In the January 13 order, the Court first concluded that under EMTALA, federal law supplies the rule of decision, and therefore according to Federal Rule of Evidence 501, federal privilege law applies. Federal law does not recognize a peer review privilege. However, in the interest of comity the Court contemplated whether the state privilege should apply. The Court, relying on *Pagano v. Oroville Hospital*, 145 F.R.D. 683 (E.D. Cal. 1993), found that comity did not warrant the application of state privilege law.

Mindful of the then-pending criminal proceedings against defendant Schug, the Court waited to issue its order until Judge Warren rendered a decision regarding the applicability of Evidence Code § 1157 in the criminal context. On January 2, 1998, Judge Warren issued a ruling holding that § 1157 was inapplicable in the criminal proceedings against defendant Schug. This Court, no longer constrained by the impact its ruling on this issue might have on Dr. Schug's state criminal case, issued its order on January 13, 1998. Immediately after this Court issued

its order, defendants notified the Court by letter that the California Court of Appeals had stayed Judge Warren's ruling as the result of a Petition for Writ of Mandate and/or Prohibition or Other Appropriate Relief. Defendants also requested that this Court reconsider its opinion. On January 20, 1998, this Court granted defendants' request for reconsideration and set a briefing schedule on the matter. In the meantime, the Writ to the California Court of Appeals was denied on January 29, 1998. The defendants then petitioned the California Supreme Court for a stay and review. That petition was denied on February 4, 1998.

In addition to defendants' motion for reconsideration, the Court has before it plaintiffs' motion to strike defendants' allegedly *ex parte* communications with the Court, as well as plaintiffs' corresponding motion for sanctions. Plaintiffs argue that defendants' letters notifying the Court of the stay on Judge Warren's ruling and requesting reconsideration of this Court's order constituted impermissible *ex parte* communications.

DISCUSSION

A. Plaintiffs' Motions to Strike *Ex Parte* Communications and for Sanctions

Plaintiffs argue that defendants engaged in improper *ex parte* communications with the Court in violation of Civil Local Rule 11-3(c). Plaintiffs object that they were not provided prior notice of defendants' communications to the Court as required by the Local Rules, and that therefore these letters should be stricken. Plaintiffs argue that defendants' letters invoke the power of the Court

and seek judicial relief, thereby affecting plaintiffs' substantive rights. In addition, plaintiffs specifically object to the letter sent by Robert Lynch, counsel for defendant Schug, on the ground that although the letter indicates that plaintiffs were copied, plaintiffs in fact never received a copy of the letter. Plaintiffs request sanctions against Mr. Lynch.

Defendants respond that they have not engaged in *ex parte* communications with the Court because plaintiffs were copied on all correspondence. Defendants state that they sent letters to the Court because they viewed the matter as a discovery dispute, and had been previously informed to notify the Court of such disputes by letter brief. With regard to the letter sent by defendant Schug, Mr. Lynch states that the failure to copy plaintiffs was due to inadvertent clerical error, but that plaintiffs were not prejudiced since defendant Schug sought the same relief – reconsideration – as sought by the other defendants.

As the Court has already decided to reconsider its January 13, 1998 order. [sic] In the Court's view, these letters were not impermissible *ex parte* communications, as plaintiffs' counsel was copied on all letters save one. As to defendant Schug's letter to the court which plaintiffs never received, the Court is persuaded that the error was inadvertent and that counsel for defendant Schug did not act in bad faith. Accordingly, the Court DENIES plaintiffs' motions to strike and for sanctions.

B. Defendants' Motion [sic] for Reconsideration

Defendants advance numerous arguments in favor of their motions for reconsideration. To the extent that defendants reargue the same points, the Court will not reconsider these arguments. However, the Court will reconsider the new arguments raised by the parties.

Defendants first argue that plaintiffs' request for the peer review records only applies to the state law claim of spoliation, and thus state privilege law should apply to this claim. However, defendants' arguments fail for two reasons. First, plaintiffs contend that the records are relevant because the defendants, and other unknown persons who may be members of the Peer Review Committee, conspired to alter, destroy and falsify Cody's medical records with regard to the care and treatment he received during his stay at Redbud. This contention is common to all causes of action, including the federal cause of action under EMTALA. As such, federal privilege law governs.

Second, assuming arguendo that the evidence was relevant only to the spoliation claim, Federal Rules of Evidence dictate that privileges asserted in federal question cases shall be governed by federal law. State privilege law applies to purely state law claims brought in federal court pursuant to diversity jurisdiction. However, state law claims that are pendent to federal question cases are governed by federal privilege law. *See Wm. T. Thompson Co. v. General Nutrition Corp., Inc.*, 671 F.2d 100, 104 (3d Cir. 1982); *Pagano v. Oroville Hospital*, 145 F.R.D. 683 (E.D. Cal. 1993); *Perrignon v. Bergen Brunswig Corp.*, 77 F.R.D. 455, 458-459 (N.D. Cal. 1978). In the instant case the Court's jurisdiction is grounded on 28 U.S.C. § 1331

based on plaintiffs' EMTALA claims. Thus, federal privilege law applies.

Defendants next argue that even if federal privilege law applies, FRE 501 provides that in the absence of a controlling statute, courts look to common law principles to determine the applicability of evidentiary principles. *See Teasdale v. Marin General Hospital*, 138 F.R.D. 691, 694 (N.D. Cal. 1991). Federal courts in the Ninth Circuit have not yet adopted California's peer review privilege. Therefore, as provided by FRE 501, the question of whether § 1157 applies in federal court is "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." FRE 501. Reason and experience dictate that the courts, in the interest of comity, look to state privilege law to ascertain the interests at stake.

Courts have held that there is no federal common law or statutory privilege protecting peer review medical records when the plaintiff's claim arises out of the disciplinary proceedings themselves. *See Pagano v. Oroville Hospital*, 145 F.R.D. 683, 691 (E.D. Cal. 1993) (holding that federal common law does not recognize medical peer review privilege in antitrust cases where the peer review itself is under attack). Courts have, however, recognized a peer review privilege in medical malpractice cases. *See Bredice v. Doctors Hospital*, 50 F.R.D. 249 (D. D.C. 1970), *aff'd* 479 F.2d 920 (D.C. Cir. 1973). Courts have drawn a distinction between medical malpractice and antitrust cases by reasoning that in medical malpractice cases the issue is whether the defendant was negligent in his care of the patient, not what transpired at a subsequent date during a peer review proceeding. *See Bredice*, 50 F.R.D.

249. In addition, disclosure of information contained in the peer review meetings would have little impact on a plaintiff's ability to prove his case. *See id.* On the other hand, in antitrust cases the claims arise out of the disciplinary proceedings themselves, and thus discovery is permitted since there would be no other source of the information. *See Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058, 1062 (7th Cir. 1981).

Defendants argue that an EMTALA claim is essentially a medical malpractice claim, and thus the reasoning of the medical malpractice cases should apply. However, EMTALA claims are not grounded in tort concepts. *See Griffith v. Mt. Carmel Medical Center*, 842 F. Supp. 1359 (D. Kan 1994). A plaintiff's claim in an EMTALA action does not rest on any proof that defendant was negligent, but rather is predicated on the hospital's violation of the EMTALA statute making the hospital strictly liable. Therefore, the Court is not persuaded that an EMTALA claim is analogous to a medical malpractice claim and thus does not apply the reasoning of those cases. In addition, the Court is persuaded that to the extent plaintiffs allege that Dr. Schug may have been instructed to create the addendum and burn his notes at the peer review meeting, plaintiffs' claim for spoliation of evidence and EMTALA depend on communications made during the peer review proceedings. Thus, this case is more like the antitrust cases than medical malpractice cases, since part of the claims arise out of the peer review meetings. Therefore, barring any overriding policy concerns, the state privilege does not apply in federal court.

Defendants argue that overriding policy concerns dictate that the state privilege should apply. First, they

argue that because state law requires medical practitioners to participate in the peer review sessions, it is unfair to then allow discovery of these meetings. Cal.Bus. & Prof. Code § 2282; Cal. Health & Saf. Code § 32128. Furthermore, defendants argue that § 1157 was instituted to encourage doctors to speak freely at such meetings in an effort to improve the quality of care. Therefore, defendants argue that the California legislature, in enacting § 1157, made a statutory promise to physicians that their self-critical commentary in peer review sessions would not be publicly disclosed. However, the action has been brought in federal court, and federal law, rather than state law, applies. Furthermore, recognizing a privilege under § 1157 would be inconsistent with the federal policy against privileges and in favor of broad disclosure.

Defendants also raise several constitutional issues. First, defendant Schug argues that emergency room doctors are more likely to be implicated in EMTALA actions than other doctors because EMTALA prevents the transfer of medically unstable patients, a situation more frequently encountered in the emergency room. Therefore, defendant Schug argues that disclosing peer review records creates a constitutionally-suspect distinction between emergency room physicians and other doctors in California. Defendant reasons that if peer records are discoverable in EMTALA actions, emergency room doctors cannot rely on confidentiality, whereas non-emergency room doctors can rely on this protection.

The Court is not persuaded by such reasoning. The status of being an emergency room doctor is not a protected characteristic warranting strict scrutiny analysis; therefore, any classification resulting from this Court's

order must meet the rational basis test. As long as there is some rational basis for the classification, the equal protection clause is not implicated. Here, the federal policies favoring disclosure and discovery in order to ascertain truth in the litigation context provide a rational basis for the classification, and therefore defendant's equal protection rights have not been violated.

Defendant Schug also argues that disclosure of the peer review records will deprive him of due process of the law. He contends that the right to pursue an occupation is a fundamental right, therefore, the government cannot impair his right to practice his profession without due process. *See Ender v. Schutzbank*, 68 Cal.2d 162, 169 (1968). However, defendant Schug's reasoning is flawed because he is being accorded due process since he is receiving a full hearing in which he can present his defense. *See id. at 172*. Therefore, defendant fails to convince the Court that disclosure will violate his due process rights.

Finally, defendant Schug argues that disclosure will violate his right to privacy in the peer review records. California recognizes a constitutional right to privacy which is consistent with federal law and therefore can be considered in deciding whether or not to disclose the peer review records. *See Pagano*, 145 F.R.D. at 695. The Court considers the following factors in determining the scope of protection to be accorded in the privacy context:

> (1) [T]he probable encroachment of the individual's privacy right if the contested action is allowed to proceed, and the magnitude of the encroachment; (2) whether the encroachment of the privacy right would impact an area that has

> traditionally been off limits from most regulation; (3) whether the desired information is available from other sources with less encroachment of the privacy right; (4) the extent to which the exercise of the individual's privacy rights impinge on the rights of others; and (5) whether the interests of society at large encourage a need for the proposed encroachment.

Pagano, 145 F.R.D. at 698-99.

In *Pagano*, the Court reasoned that fourth and fifth factors [sic], which both bear on the policies favoring discovery, outweighed the first two factors which bear on the degree of encroachment. This is because discovery and admissibility of relevant truthful information affect the individual rights of litigants as well as the public interest. As one court has noted, "litigation has the tendency to make public the sort of information that individuals would otherwise prefer to keep private. Public disclosure, in the end, is not only natural and generally unavoidable but also necessary and healthy to a process so dependent on truth and accuracy." *Cook v. Yellow Freight System, Inc.*, 132 F.R.D. 548, 551 (E.D. Cal. 1990) (as cited in *Pagano*, 145 F.R.D. at 699). In addition, the names of patients and physicians were kept confidential in order to minimize the degree of encroachment upon the privacy rights of individuals. Finally, because the information sought was not available from other sources, the third factor also weighed in favor of disclosure.

In applying the five factors above, the Court finds the reasoning in *Pagano* persuasive. Here, the only relevant

information is that directly related to the care of Cody. Furthermore, in Dr. Shug's criminal trial, the peer review records have already been discovered. Therefore, the balance of the five factors enumerated above, as well as the overall federal policy favoring broad disclosure, convince this Court that disclosure does not impermissibly violate Dr. Schug's right to privacy, especially since the information has already been revealed in the criminal context.

In conclusion, the Court finds that the hospital peer review records are discoverable, subject to a protective order. The parties are directed to submit a stipulated protective order providing for disclosure but ensuring the privacy of the physicians other than Dr. Shug. The Court, may at a later time and for good cause shown, entertain a motion for disclosing the identity of the physicians insofar as it is relevant to the plaintiffs' case. The information disclosed pursuant to this order shall be designated as "Confidential Material," and shall be used solely in connection with this litigation, or related appellate procedures, and not for any other purpose.

C. Pending discovery disputes

During a case management conference on February 23, 1998, counsel for plaintiffs informed the Court that he believed there were numerous unresolved discovery disputes pending before the Court. Plaintiffs have since submitted a letter identifying these pending disputes, which plaintiffs contend are still pending from plaintiffs' Motion to Compel submitted October 22, 1997. It is this Court's understanding, as well as defendants', that this

Court's November 3, 1997 order resolved all the discovery disputes as raised in plaintiffs' motion, except those dependent upon the Court's ruling on the applicability of § 1157. In the interest of clarity, the Court will reiterate what is already contained in the November 3, 1997 order: (1) defendants Redbud and Adventist have not waived their privileges because a privilege log had been produced; (2) plaintiffs are limited to 25 interrogatories per defendant; (3) defendant Adventist is ordered to produce documents #2, 6, 8, and 9; (4) defendant Redbud is ordered to produce documents #14 and 17. Furthermore, because the Court is now ruling that § 1157 is not applicable in federal court, to the extent that defendants objected to any discovery disputes on the basis of the applicability of § 1157, they are now ordered to respond.

Defendant Adventist correctly notes that if the Court rules that § 1157 is not applicable, Adventist will be required to answer plaintiffs' First Set of Interrogatories to defendant Adventist Health. However, Adventist is only required to answer numbers 1, 2a, 2b, 2c, 3e, 3f, 3g, 3h, 3i, 3j, 4 5a, 5b, 5c, 5d, 5e, because this comports with the 25 interrogatory limits imposed in the Court's November 3, 1997 Order. In addition, Adventist concedes that it will have to produce Mr. Shultz for further deposition if § 1157 is not applicable. However, because Mr. Shultz has been previously deposed, this deposition should be limited to subject matter thought to be protected by § 1157 which is no longer protected.

Defendant Schug requests further opportunity to brief the issues regarding his deposition, interrogatories and document production because he contends that previous briefing focused primarily on his fifth amendment

rights. The Court declines to grant this request because the parties have been given ample time to raise all objections. As such, any discovery which was withheld on the basis of § 1157 is now ordered to be produced, including interrogatories, depositions, and documents.

With respect to the deposition of Ms. DeLashmutt, the Court construes plaintiffs' request as a motion to complete her deposition. The Court has read the portions of the deposition submitted by plaintiffs and will allow plaintiffs to complete the deposition because it agrees that defendants' counsel impermissibly coached Ms. DeLashmutt. All parties should be advised that objections should not be used to attempt to coach a witness. *See Hall v. Clifton Precision*, 150 F.R.D. 525, 531 (E.D. Pa. 1993). All objections to form of the question should be succinct and clearly state the objection. Further objections based on privilege should merely state the privilege asserted.

CONCLUSION

For the foregoing reasons, plaintiffs' motions to strike *ex parte* communications and for sanctions is DENIED and defendants' motion for reconsideration is DENIED in that § 1157 does not apply in federal court, but is GRANTED with respect to protective order of materials discovered.

IT IS ORDERED.

/s/ Susan Illston
SUSAN ILLSTON
United States District Judge

Dated: May 5, 1998

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re: REDBUD COMMUNITY HOSPITAL DISTRICT	No. 98-70610
	DC# CV-96-4345-SYI Northern California
REDBUD COMMUNITY HOSPITAL, ADVENTIST HEALTH, INC.,	
Petitioners,	(Filed Jun. 8, 1998)
vs.	
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,	
Respondent,	
DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; et al.,	
Real Parties in Interest.	
WOLFGANG SCHUG, M.D.,	No. 98-70616
Petitioner,	
vs.	
UNITED STATED DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,	
Respondent,	
DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; et al.,	ORDER
Real Parties in Interest.	

Before: REINHARDT, THOMPSON, and LEAVY, Circuit Judges

The court on its own motion consolidates case nos. 98-70610 and 98-70616.

These petitions for writs of mandamus raise issues that warrant a response. *See* Fed. R. App. P. 21 (b). Accordingly, within 14 days of this order, the real parties in interest shall file a response.

The district court may file a response if it so desires. Petitioners may file a reply within 7 days of service of the response(s). The petitions, response(s) and any reply shall be referred to the next available motions panel.

Petitioners' request for a stay of the May 5, 1998 order pending resolution of their petitions is granted.

The Clerk shall serve a copy of this order on the district court.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re: REDBUD COMMUNITY HOSPITAL DISTRICT	No. 98-70610
	DC# CV-96-4345-SYI Northern California
REDBUD COMMUNITY HOSPITAL, ADVENTIST HEALTH, INC.,	
Petitioners,	
vs.	(Filed Jun. 29, 1998)
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,	
Respondent,	
DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; et al.,	
Real Parties in Interest.	
WOLFGANG SCHUG, M.D.,	No. 98-70616
Petitioner,	
vs.	
UNITED STATED DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,	
Respondent,	ORDER
DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; et al.,	
Real Parties in Interest.	

Before: REINHARDT, THOMPSON, and LEAVY, Circuit Judges

The motion of the California Medical Association and the California Healthcare Association for leave to file a letter brief in support of petitioners' request for a writ of mandamus is granted.

These madamus petitions are referred to a merits panel for disposition. Petitioners' request for leave to file a reply brief on or before July 17, 1998 is granted. Because the principal briefs have been filed, these matters are now ready to be calendared.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re: REDBUD COMMUNITY HOSPITAL DISTRICT	No. 98-70610
	D.C. No. CV-96-04345-SI
REDBUD COMMUNITY HOSPITAL, ADVENTIST HEALTH, INC.,	(Filed Dec. 31, 1998)
Petitioner [sic],	
v.	
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,	
Respondent,	
and	
DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; DAVID BURROWS and RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,	
Real Party [sic] in Interest.	
WOLFGANG SCHUG, M.D.,	No. 98-70616
Petitioner,	D.C. No. CV-96-04345-SI
v.	
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,	
Respondent,	

and

DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; DAVID BURROWS and RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,

Real Party [sic] in Interest.

DAVID BURROWS, Successor-In-Interest; CODY BURROWS, Deceased; RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,

Plaintiffs-Appellees,

v.

REDBUD COMMUNITY HOSPITAL DISTRICT; M. FRED BREWER; ADVENTIST HEALTH INC.; JJ&R EMERGENCY MANAGEMENT GROUP INC.; EMERGENCY MEDICAL MANAGEMENT SERVICES, INC.,

Defendants,

and

WOLFGANG SCHUG, M.D.,

Defendant-Appellant.

No. 98-16089

D.C. No. CV-96-04345-SI

ORDER

Before: HUG, Chief Judge, FLETCHER, and TROTT, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing. Judges Hug and Trott have voted

to reject the suggestion for rehearing en banc, and Judge Fletcher so recommends.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In Re: REDBUD COMMUNITY HOSPITAL DISTRICT	No. 98-70610
	D.C. No. CV-96-04345-SI
REDBUD COMMUNITY HOSPITAL, ADVENTIST HEALTH, INC.,	
Petitioner [sic],	(Filed Jan. 21, 1999)
v.	
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,	
Respondent,	
and	
DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; DAVID BURROWS and RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,	
Real Party [sic] in Interest.	
WOLFGANG SCHUG, M.D.,	No. 98-70616
Petitioner,	D.C. No. CV-96-04345-SI
v.	
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,	
Respondent,	

and

DAVIS [sic] BURROWS, Successor-In-Interest to Cody Burrows, Deceased; DAVID BURROWS and RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,

Real Party [sic] in Interest.

DAVID BURROWS, Successor-In-Interest; CODY BURROWS, Deceased; RHODA THOMAS, Individually and as Heirs and Surviving Parents of Cody Burrows,

Plaintiffs-Appellees,

v.

REDBUD COMMUNITY HOSPITAL DISTRICT; M. FRED BREWER; ADVENTIST HEALTH INC.; JJ&R EMERGENCY MANAGEMENT GROUP INC.; EMERGENCY MEDICAL MANAGEMENT SERVICES, INC.,

Defendants,

and

WOLFGANG SCHUG, M.D.,

Defendant-Appellant.

No. 98-16089

D.C. No. CV-96-04345-SI

ORDER

TROTT, Circuit Judge:

Petitioner's [sic] motion for a stay of the mandate is GRANTED for 60 days from the date of this order so that

it [sic] may file a petition for a writ of certiorari. Fed. R. App. P. 41(d)(2)(A-B).

Federal Rules of Evidence

Rule 501. General Rule

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

* * *

California Evidence Code

§ 1157. Proceedings and records of organized committees having responsibility of evaluation and improvement of quality of care; exceptions

(a) Neither the proceedings nor the records of organized committees of medical, medical-dental, podiatric, registered dietitian, psychological, or veterinary staffs in hospitals, or of a peer review body, as defined in Section 805 of the Business and Professions Code, having the responsibility of evaluation and improvement of the quality of care rendered in the hospital, or for that peer review body, or medical or dental review or dental hygienist review or chiropractic review or podiatric review or

registered dietitian review or veterinary review or acupuncturist review committees of local medical, dental, dental hygienist, podiatric, dietetic, veterinary, acupuncture, or chiropractic societies, or psychological review committees of state or local psychological associations or societies having the responsibility of evaluation and improvement of the quality of care, shall be subject to discovery.

(b) Except as hereinafter provided, no person in attendance at a meeting of any of those committees shall be required to testify as to what transpired at that meeting.

(c) The prohibition relating to discovery or testimony does not apply to the statements made by any person in attendance at a meeting of any of those committees who is a party to an action or proceeding the subject matter of which was reviewed at that meeting, or to any person requesting hospital staff privileges, or in any action against an insurance carrier alleging bad faith by the carrier in refusing to accept a settlement offer within the policy limits.

(d) The prohibitions in this section do not apply to medical, dental, dental hygienist, podiatric, diatetic, psychological, veterinary, acupuncture, or chiropractic society committees that exceed 10 percent of the membership of the society, nor to any of those committees if any person serves upon the committee when his or her own conduct or practice is being reviewed.

(e) The amendments made to this section by Chapter 1081 of the Statutes of 1983, or at the 1985 portion of the 1985-86 Regular Session of the Legislature, or at the

1990 portion of the 1989-90 Regular Session of the Legislature, do not exclude the discovery or use of relevant evidence in a criminal action.

* * *

United States Code, Title 42

§ 1395dd. Examination and treatment for emergency medical conditions and women in labor

(a) Medical screening requirement

In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subschapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section) exists.

(b) Necessary stabilizing treatment for emergency medical conditions and labor

(1) In general

If any individual (whether or not eligible for benefits under this subchapter, comes to a hospital and the hospital determines that the individual has a emergency medical condition, the hospital must provide either –

(A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or

(B) for transfer of the individual to another medical facility in accordance with subsection (c) of this section.

(2) Refusal to consent to treatment

A hospital is deemed to meet the requirement of paragraph (1)(A) with respect to an individual if the hospital offers the individual the further medical examination and treatment described in that paragraph and informs the individual (or a person acting on the individual's behalf) of the risks and benefits to the individual of such examination and treatment, but the individual (or a person acting on the individual behalf) refuses to consent to the examination and treatment. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such examination and treatment.

(3) Refusal to consent to transfer

A hospital is deemed to meet the requirement of paragraph (1) with respect to an individual if the hospital offers to transfer the individual to another medical facility in accordance with subsection (c) of this section and informs the individual (or person acting on the individual's behalf) of the risks and benefits to the individual on such transfer, but the individual (or a person acting on the individual's behalf, refuses to consent to the transfer. The hospital shall take all reasonable steps to secure the individual's (or person's) written informed consent to refuse such transfer.

(c) Restricting transfers until individual stabilized

(1) Rule

If an individual at a hospital has an emergency medical condition which has not been stabilized (within the meaning of subsection (e)(3)(B) of this section), the hospital may not transfer the individual unless –

(A)(i) the individual (or a legally responsible person acting on the individual's behalf) after being informed of the hospital's obligations under this section and of the risk of transfer, in writing requests transfer to another medical facility,

(ii) a physician (within the meaning of section 1395x(r)(1) of this title) has signed a certification that based upon the information available at the time of transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the individual and, in the case of labor, to the unborn child from effecting the transfer, or

(iii) if a physician is not physically present in the emergency department at the time an individual is transferred, a qualified medical person (as defined by the Secretary in regulations) has signed a certification described in clause (ii) after a physician (as defined in section 1395x(r)(1) of this title), in consultation with the person, has made the determination described in such clause, and subsequently countersigns the certification; and

(B) the transfer is an appropriate transfer (within the meaning of paragraph (2)) to that facility.

A certification described in clause (ii) or (iii) of subparagraph (A) shall include a summary of the

risks and benefits upon which the certification is based.

(2) Appropriate transfer

An appropriate transfer to a medical facility is a transfer –

(A) in which the transferring hospital provides the medical treatment within its capacity which minimizes the risks to the individual's health and, in the case of a woman in labor, the health of the unborn child;

(B) in which the receiving facility –

(i) has available space and qualified personnel for the treatment of the individual, and

(ii) has agreed to accept transfer of the individual and to provide appropriate medical treatment;

(C) in which the transferring hospital sends to the receiving facility all medical records (or copies thereof), related to the emergency condition for which the individual has presented, available at the time of the transfer, including records related to the individual's emergency medical condition, observations of signs or symptoms, preliminary diagnosis, treatment provided, results of any tests and the informed written consent or certification (or copy thereof) provided under paragraph (1)(A), and the name and address of any on-call physician (described in subsection (d)(1)(C) of this section) who has refused or failed to appear within a reasonable time to provide necessary stabilizing treatment;

(D) in which the transfer is effected through qualified personnel and transportation equipment, is required including the use of necessary and medically appropriate life support measures during the transfer; and

(E) which meets such other requirements as the Secretary may find necessary in the interest of the health and safety of individuals transferred.

(d) Enforcement

(1) Civil money penalties

(A) A participating hospital that negligently violates a requirement of this section is subject to a civil money penalty of not more than $50,000 (or not more than $25,000 in the case of a hospital with less than 100 beds) for each such violation. The provisions of section 1320a-7a of this title (other than subsections (a) and (b)) shall apply to a civil money penalty under this subparagraph in the same manner as such provisions apply with respect to a penalty or proceeding under section 1320a-7a(a) of this title.

(B) Subject to subparagraph (C), any physician who is responsible for the examination, treatment, or transfer of an individual in a participating hospital, including a physician on-call for the care of such an individual, and who negligently violates a requirement of this section, including a physician who –

(i) signs a certification under subsection (c)(1)(A) of this section that the medical benefits reasonably to be expected from a transfer to another facility outweigh the risks associated with the transfer, if the physicians knew or should have known that the benefits did not outweigh the risks, or

(ii) misrepresents an individual's condition or other information, including a hospital's obligations under this section,

is subject to a civil money penalty of not more than $50,000 for each such violation and, if the violation is gross and flagrant or is repeated, to exclusion from participation in this subchapter and State health care programs. The provisions of section 1320a-7a of this title (other than the first and second sentences of subsection (a) and subsection (b)) shall apply to a civil money penalty and exclusion under this subparagraph in the same manner as such provisions apply with respect to a penalty, exclusion, or proceeding under section 1320a-7a(a) of this title.

(C) If, after an initial examination, a physician determines that the individual requires the services of a physician listed by the hospital on its list of on-call physicians (required to be maintained under section 1395cc(a)(1)(I) of this title) and notifies the on-call physician and the on-call physician fails or refuses to appear within a reasonable period of time, and the physician orders the transfer of the individual because the physician determines that without the services of the on-call physician the benefits of transfer outweigh the risks of transfer, the physician authorizing the transfer shall not be subject to a penalty under subparagraph (B). However, the previous sentence shall not apply to the hospital or to the on-call physician who failed or refused to appear.

(2) Civil enforcement

(A) Personal harm

Any individual who suffers personal harm as a direct result of a participating hospital's violation of a requirement of this section may,

in a civil action against the participating hospital, obtain those damages available for personal injury under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

(B) Financial loss to other medical facility

Any medical facility that suffers a financial loss as a direct result of a participating hospital's violation of a requirement of this section may, in a civil action against the participating hospital, obtain those damages available for financial loss, under the law of the State in which the hospital is located, and such equitable relief as is appropriate.

(C) Limitations on actions

No action may be brought under this paragraph more than two years after the date of the violation with respect to which the action is brought.

(3) Consultation with peer review organizations

In considering allegations of violations of the requirements of this section in imposing sanctions under paragraph (1), the Secretary shall request the appropriate utilization and quality control peer review organization (with a contract under part B of subchapter XI of this chapter) to assess whether the individual involved had an emergency medical condition which had not been stabilized, and provide a report on its findings. Except in the case in which a delay would jeopardize the health or safety of individuals, the Secretary shall request such a review before effecting sanction under paragraph (1) and shall provide a period of at least 60 days for such review.

(e) Definitions

In this section:

(1) The term "emergency medical condition" means –

(A) a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in –

(i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,

(ii) serious impairment to bodily functions, or

(iii) serious dysfunction of any bodily organ or part; or

(B) with respect to a pregnant women [sic] who is having contractions –

(i) that there is inadequate time to effect a safe transfer to another hospital before delivery, or

(ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

(2) The term "participating hospital" means hospital that has entered into a provider agreement under section 1395cc of this title.

(3)(A) The term "to stabilize" means, with respect to an emergency medical condition described in paragraph (1)(A), to provide such medical treatment of the condition as may be necessary to assure,

within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), to deliver (including the placenta).

(B) The term "stabilized" means, with respect to an emergency medical condition described in paragraph (1)(A), that no material deterioration of the condition is likely, within reasonable medical probability, to result from or occur during the transfer of the individual from a facility, or, with respect to an emergency medical condition described in paragraph (1)(B), that the woman has delivered (including the placenta).

(4) The terms "transfer" means the movement (including the discharge) of an individual outside a hospital's facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital, but does not include such a movement of an individual who (A) has been declared dead, or (B) leaves the facility without the permission of any such person.

(5) The term "hospital" includes a critical access hospital (as defined in section 1395x(mm)(1) of this title).

(f) Preemption

The provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section.

(g) Nondiscrimination

A participating hospital that has specialized capabilities or facilities (such as burn units, shock-trauma units, neonatal intensive care units, or (with respect to rural areas) regional referral centers as identified by the Secretary in regulation) shall not refuse to accept an appropriate transfer of an individual who requires such specialized capabilities or facilities if the hospital has the capacity to treat the individual.

(h) No delay in examination or treatment.

A participating hospital may not delay provision of an appropriate medical screening examination required under subsection (a) of this section or further medical examination and treatment required under subsection (b) of this section in order to inquire about the individual's method of payment or insurance status.

(i) Whistleblower protections

A participating hospital may not penalize or take adverse action against a qualified medical person described in subsection (c)(1)(A)(iii) or a physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee because the employee reports a violation of a requirement of this section.

* * *

(2) (3)

Nos. 98-1513 and 98-1526

Supreme Court, U.S.
FILED
MAY 5 1999
OFFICE OF THE CLERK

In The

Supreme Court of the United States

REDBUD COMMUNITY HOSPITAL,
ADVENTIST HEALTH, INC.,

vs. *Petitioners,*

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, DAVID BURROWS, RHODA THOMAS,

Respondents,

and

WOLFGANG SCHUG, M.D.,

vs. *Petitioner,*

DAVID BURROWS, successor-in-interest to Cody Burrows, deceased; DAVID BURROWS and RHODA THOMAS individually and as heirs and surviving parents of Cody Burrows,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO BOTH PETITIONS FOR WRITS OF CERTIORARI

James M. Braden
Law Offices of James M. Braden
44 Montgomery Street, Suite 1210
San Francisco, California 94104
Phone: (415) 398-6865
Fax: (415) 788-5605

Richard J. Massa
Massa & Associates
120 North Forbes Street
Lakeport, California 95453
Phone: (707) 262-0230
Fax: (707) 262-1028

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

4688

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The district court issued an interlocutory discovery order for production of hospital records, names of witnesses, and other evidence that petitioners wish to conceal. The court effectively denied petitioner Schug's request to certify the order for immediate appeal pursuant to 28 U.S.C. Sec. 1292. The order as to documents was directed not to Schug, but only to the hospital petitioners, because only they had custody of the supposedly privileged materials.

Petitioner Schug nevertheless filed a purported appeal as of right, ignoring the general rule against uncertified interlocutory appeals in civil cases. The appeal was, therefore, summarily dismissed based on controlling Ninth Circuit authority, which is consistent with Supreme Court and other circuits' authority, that parties to a civil case may not have automatic interlocutory appeals of discovery orders, unlike third-party witnesses served with grand jury subpoenas.

Both Schug's and the Hospitals' separate petitions for writs of mandamus also were summarily denied by the 9th Circuit, based on authority in that Circuit, which again is consistent with authority of the U.S. Supreme Court, that mandamus will not lie unless the district court abused its discretion by issuing a clearly erroneous ruling. Accordingly, the Ninth Circuit's rulings on both the appeal and the mandamus petitions were contained in a single one-page, unpublished order.

Based on this history, the *actual* questions presented, which would have to be decided favorably to petitioners

COUNTER-STATEMENT OF QUESTIONS PRESENTED – Continued

before this Court could consider the questions of substantive "privilege" law they present, are:

(1) Should the Court of Appeals for the Ninth Circuit have issued a writ of mandamus to overturn an interlocutory district court civil discovery order on the ground of a purported state (not federal) law medical peer review "privilege," where no showing was made that the order was clearly erroneous and hence an abuse of discretion, in light of the admissions in the briefs below and in both petitions here that applicability of this state "privilege" under federal law has been rejected by numerous federal courts and thus is at best a debatable proposition?

(2) Does a party in civil litigation who claims he would be irreparably harmed by release of documents held by another party in the case have the right to automatic interlocutory appeal, after being denied discretionary leave to appeal, to challenge the discovery order on the ground that the materials are "privileged"?

Respondents submit that the answers to both questions are well settled in the negative and are unworthy of review by this Court. First, petitioners do not come even close to meeting the high standard for the extraordinary remedy of mandamus. Second, the purported interlocutory appeal is conclusively barred by longstanding statute, case law, and judicial policy.

Respondents submit that the petitions should be summarily denied on that basis and that the tendentious questions posed by petitioners cannot and need not be

COUNTER-STATEMENT OF QUESTIONS PRESENTED – Continued

reached given the procedural posture of this interlocutory proceeding.

Moreover, the questions in both petitions as to whether the purported privilege should apply to respondents' state law claims for medical malpractice as well as to their federal claims for EMTALA violations are red herrings. The district court's order pertains solely to discovery of the records from the hospital and does not reach the admissibility of the records in the trial of the state or federal law claims; thus it is not accurately described as a ruling on "privilege" at all. As only release is at issue, it would make absolutely no difference at this stage whether this case contained only the federal EMTALA claim or, as it does, both state law and federal claims. In either event, the only two possible outcomes are that the records are either released to respondents or they remain concealed.

PARTIES TO THE PROCEEDINGS

The two petitions accurately list the parties to the proceedings.

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I.

COUNTER-STATEMENT OF THE CASE

The petitions should be denied because, very simply, this is the wrong case for the United States Supreme Court to consider what might otherwise be interesting questions of privilege law (or, more accurately, of civil discovery law). There are three decisive reasons for this.

(1) Petitioners fail to appreciate, or at least to point out for this Court, that the interlocutory nature of the challenged discovery order is fatal to their campaign for appellate review. It is no accident that the Ninth Circuit, after full briefing and oral argument, issued an *unpublished* order summarily denying both the Hospitals' and Dr. Schug's petitions for mandamus and summarily dismissing Dr. Schug's separate appeal. There is no reason to believe the Ninth Circuit failed to understand from the lengthy briefs (two rounds per side) and oral argument that the issues presented were of *potentially* significant legal interest. But that Court, like this Court, is not inclined to ignore equally important legal doctrines that bar the type of piecemeal, interlocutory delay of civil case discovery orders that these petitioners have so far created.

Thus, the Ninth Circuit summarily disposed of this matter because the separate appeal was barred under clear authority against the very type of interlocutory derailment of ongoing civil litigation Dr. Schug improperly perpetrated by filing it, and has exacerbated by bringing to this Court. And the mandamus petitions were flawed because petitioners' presentation to the Ninth Circuit, like the one they make here, proved that the district

court could not have abused its discretion — needed to justify reversal by that extraordinary writ — because the existence of the purported privilege under federal law was, at best, debatable.

(2) This also is the wrong case *on the facts* for the seminal review of federal privilege (or discovery) law that petitioners want this Court to undertake. They present the case as though it involved nothing more than a discovery attempt by respondents, approved by the district court, to strike at California's protection for doctors to express their candid opinions of medical services rendered by other doctors, or even for an accused doctor to be candid about his own work. But that is *not* the thrust of respondents' discovery effort and that was *not* the fact situation as it appeared to the district court.

Rather, the district court did *not* rule that respondents are entitled to the so-called peer review documents, witness names, and other information because it thought plaintiffs in *every* case ought to be allowed to see what other doctors thought of a defendant doctor's work. Rather, the court based its decision on evidence that the peer review process had been corrupted by misconduct separate from the underlying EMTALA violations or medical malpractice Dr. Schug committed. The hospital petitioners, though not petitioner Schug, note this in passing (at p. 6 of Hospitals' petition), but breezily dismiss it.

But these facts, as the district court itself said, were crucial to its decision because the apparent corruption within the peer review process itself brings this case closer to numerous federal cases, including antitrust and

employment discrimination complaints, as well as California state cases involving alleged criminal violations, where the state privilege has been overridden due to similar process corruption facts. Such cases, like this one, are quite unlike petitioners' model of doctors being forced to reveal what they said about other doctors. That is, respondents are not seeking opinions, but rather facts, documents and the identity of witnesses that would prove the process was corrupted.

Respondents contend that principal defendant Schug, perhaps aided and abetted by others at the Hospital, violated the California Penal Code by fraudulently creating a false medical record to cover up gross misconduct. Schug indeed admitted under oath the bizarre act of burning his original notes in a bonfire at his home. Such violation of law would not entitle the hospital to the privilege even under California state law, contrary to petitioners' false assertion that it is "undisputed" the state privilege would bar the discovery if there were no federal claims in this case. And even if there were no criminal violation, proof of such independent spoliation of evidence would also arguably eliminate the state privilege, even if state law instead of federal law were to apply.

The district court thus wrote: "[T]o the extent plaintiffs allege that Dr. Schug may have been instructed to create the [false] addendum and burn his notes at the peer review meeting, plaintiff's claims for spoliation of evidence *and EMTALA* depend on communications made during the peer review proceedings. Thus, this case is more like the antitrust cases than medical malpractice cases, since part of the claims arise out of peer review meetings." Hospital Pet. App. 16 (emphasis added).

Although the Hospital petitioners do quote this passage in their brief, they give it a misleading spin by immediately adding that the district court "did not state why it would not delay discovery until plaintiffs explained in greater detail how the Hospital's peer review process was involved in the claims plaintiffs were asserting, nor did it say why it would not conduct an *in camera* review of the documents." Hospital Pet. 6.

But respondents provided the district court as much explanation as they could — without actually seeing the withheld evidence — of how the Hospital's peer review process apparently was corrupted. Whether the district court needed to make an *in camera* review of the concealed evidence is within that court's zone of discretion and surely cannot be an appropriate matter for review by the United States Supreme Court. The discovery record in this case already includes at least 25 depositions, four volumes of grand jury testimony in criminal proceedings against Dr. Schug, and hundreds of documents that contain thousands of pages. All this material was available to the district court prior to its determination that respondents had presented a sufficiently plausible allegation of direct corruption of the peer review process to justify discovery of relevant records, and some of it was reviewed by that court.

It borders on the absurd for petitioners to invite the United States Supreme Court to intervene, on an *interlocutory* basis in this civil proceeding, to upset the district court's determination of whether and to what extent this evidence supports the discovery sought by respondents under the well-recognized exception, even when a state privilege is otherwise applicable, for situations where the

peer review process is, itself, corrupt or otherwise implicated in the predicate facts of the case.

(3) Both petitions present a purported legal question that was not the primary basis for the district court's decision. That question, therefore, is not properly before this Court. That is, even if this Court were to accept it for review and decide it favorably to petitioners, the district court's ruling would still have to stand based on that court's primary — and independent — ground for decision.

Petitioners argue that this case presents a proper vehicle for decision of a question purportedly left open by this Court in *Jaffee v. Redmond*, 518 U.S. 1 (1996), which they describe as being whether "state law claims that are pendent to federal question cases are governed by federal privilege law." Hospital Pet. 11 (quoting Hosp. Pet. App. 14). The district court did opine that respondents' state law claims against Dr. Schug and the Hospital would be "governed" by federal privilege law.

But that opinion was presented by the district court merely as an *alternative* ground for its ruling "assuming arguendo that the [peer review] evidence was relevant only to the [state law] spoliation claim." (Hospital Pet. App. 14.) Both petitioners overlook, however, that the court had just given its *primary* ground for decision that rendered the alternative ground mere surplusage:

> "Defendants first argue that plaintiff's request for the peer review records only applies to the state law claim of spoliation, and thus state privilege law should apply to this claim. However, defendants' arguments fail for two reasons. First, plaintiffs contend that that the

> records are relevant because the defendants, and other unknown persons who may be members of the Peer Review committee, conspired to alter, destroy, and falsify Cody [Burrows'] medical records with regard to the care and treatment he received during his stay at Redbud [Hospital]. *This contention is common to all causes of action, including the federal cause of action under EMTALA. As such federal privilege law governs."* (Hospital Pet. App. 14, emphasis added.)

That ruling alone is sufficient to justify the district court's order granting respondents discovery of the alleged peer review information. Nothing the court went on to gratuitously add "arguendo" about purported applicability of the privilege to the state law claims can add or subtract anything from the adequate basis for that ruling. Even if there were no state law claims in this case at all, the district court's discovery order would stand on its own purely federal law foundation based on that court's study of the facts of this case which is inappropriate for interlocutory review by the Supreme Court.

Moreover, the district court's "arguendo" separate ground refers to the information's potential relevance to state law spoliation claims, but not to the separate state law claims for medical malpractice. But as Petitioner Schug mentions in passing in a footnote not linked to discussion of the purported *Jaffee v. Redmond* issue, the state law spoliation claim no longer exists. On May 11, 1998, just six days after the district court's opinion just quoted, the California Supreme Court abolished that as a valid state law cause of action. *Cedars-Sinai Medical Center v. Superior Court (Bowyer)*, 18 Cal.4th 1, 954 P.2d 511, 74 Cal.Rptr.2d 248 (1998), cited in Schug Pet. 3 n.2.

In essence, therefore, petitioners are seeking a merely advisory opinion by this Court pertaining to an issue that was not even necessary to the district court's decision in the first place and which, in any event, was effectively mooted by the California Supreme Court just a few days afterwards.

We emphasize that both petitioners' presentations of this case as one concerning "privilege" is misleading. While California Evidence Code Sec. 1157 could be viewed as establishing a form of privilege by implication, the statute in terms refers only to *discovery* of documents. It does not determine whether documents, once discovered, would be admissible as evidence at trial. See *Alexander v. Superior Court*, 5 Cal.4th 1218, 1223 n.4, 23 Cal.Rptr.2d 397, 859 P.2d 96 (1993) ("Evidence Code Sec. 1157 creates only a privilege against discovery from medical staff committees; it does not create a bar against introduction of evidence.") The district court has made no ruling on whether any peer review information, once released to respondents, would be admitted.

Thus, while the state law claims of malpractice do remain in this case, the potential *Jaffee v. Redmond* issue of whether federal "privilege" law would govern their admissibility as to those state claims is not yet ripe for decision. That is because, of course, the district court has not yet had occasion to rule on that question.

This is yet another reason why petitioners' persistence in interlocutory delay of this civil case is so obviously improper. If and when purportedly privileged documents are admitted into evidence in support of respondents' state malpractice claims, and an adverse

judgment is rendered against one or both petitioners, their *Jaffee v. Redmond* questions might at least arguably (without conceding the point) be worthy of certiorari review by this Court.

II.

LEGAL ARGUMENTS FOR DENYING THE WRITS

A. Neither Petition Even Attempts to Argue That Any Novel Issue of Mandamus Law Is Presented By The Ninth Circuit's Unpublished Summary Denial of Writs of Mandamus Against An Interlocutory Discovery Order. The Petitions, In Fact, Demonstrate Effectively, and Thus Concede, That There Is Sufficient Conflicting Authority That The District Court's Discovery Order Cannot Possibly Meet the Abuse of Discretion/Clearly Erroneous Standard for Mandamus Relief.

Petitioners would have this Court leap over the procedural posture of this case and conduct a plenary examination of federal medical "privilege" (discovery) law as though the Ninth Circuit had already done that in a published opinion in a case properly before it on appeal from a final judgment. This, of course, is not the case.

The reason the Ninth Circuit summarily declined petitioners' invitation is the same reason this Court should do so: The district court's opinion is light-years short of the clearly erroneous/abuse of discretion that is necessary for the extraordinary remedy of mandamus to reverse an interlocutory discovery order. Indeed, this Court's strictures against mandamus in such situations

appear to be materially stronger even than those uniformly applied followed by the courts of appeal.

Petitioners cannot escape the decisive threshold issue of mandamus law merely by alleging, as they do, that this Court has jurisdiction of their petitions under the general certiorari statute, 28 U.S.C. Sec. 1254(1), rather than under the separate statute, 28 U.S.C. Sec. 1651, that gives this Court power to issue "all writs necessary or appropriate." Although petitioners are not asking the Supreme Court directly to issue writs of mandamus to the district court, their request for reversal of the Ninth Circuit's summary action is that this Court order the Ninth Circuit to issue those writs of mandamus. That, obviously, is tantamount to the Supreme Court's directly issuing the writs.

It is well settled that this Court will not issue (or order the issuance of) writs of mandamus against interlocutory district court orders absent truly extraordinary circumstances. Orders that are not appealable by reason of their interlocutory nature may not ordinarily be reviewed by mandamus, even though the hardship of a prolonged trial "is imposed on parties who are compelled to await the correction of an alleged error at an interlocutory stage by an appeal from a final judgment." *United States Alkali Association v. United States*, 325 U.S. 196, 202 (1945); *Roche v. Evaporated Milk Association*, 319 U.S. 21, 25-32 (1943); *Bankers Life Co. v. Holland*, 346 U.S. 379, 382-83 (1953); *Will v. United States*, 389 U.S. 90, 96-98 (1961); *Parr v. United States*, 351 U.S. 513, 520 (1956). Mandamus writs "are drastic and extraordinary remedies [to be] reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259 (1947); *Will, supra*, 389 U.S. at

106-07. "The power to issue [the writs] is discretionary and it is sparingly exercised." *Parr, supra*, 351 U.S. at 520.

This Court has repeatedly emphasized that mandamus, which can have "the unfortunate consequence of making the [district court] judge a litigant" — as is the case here at least with the Hospitals' petition — should be restricted to extraordinary situations in order to implement the long-standing congressional policy against piecemeal appellate litigation, "particularly in an era of excessively crowded lower court dockets." *Kerr v. United States District Court*, 426 U.S. 394, 402-03 (1976) (unanimously upholding Ninth Circuit's summary denial of petition for writ of mandamus on alleged ground, as here, that district court's discovery order violated purported privilege). To that end, the party seeking the writ must show that his right to it is "clear and indisputable." *Id.*

The Supreme Court has long refused to issue, or order lower courts to issue, writs of mandamus to control or reverse the discretionary acts of district courts. *Ex parte Bradley*, 7 Wall. 364 (1863); *Ex parte Parker*, 120 U.S. 737 (1887). Because the district court was exercising power within its zone of discretion, the Supreme Court more recently went out of its way to *reverse* the issuance of writs of mandamus by courts of appeal in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 659 (1978), and *Allied Chemical Corp. v. Daiflon, Inc.*, 437 U.S. 659 (1978). These cases underscore the important policy against using mandamus and other extraordinary writs as a means to obtain appellate review of non-appealable interlocutory orders.

The Ninth Circuit followed its own case law, which is to similar effect as the foregoing Supreme Court cases, when it summarily refused to overturn the district court's interlocutory discovery by writ of mandamus. It was clear enough even under the Circuit's law that petitioners did not even come close to making a case for the extraordinary relief they sought.

The U.S. Supreme Court's even stronger statements of reluctance to use or order use of the writ adds a further barrier that petitioners cannot possibly overcome. For these petitions to be worthy of Supreme Court consideration, they would have to make a plausible case not merely that the district court was clearly erroneous and abused its discretion in ordering discovery, but that the Ninth Circuit was, itself, clearly erroneous and abused its discretion by not using mandamus to reverse the district court.

Petitioners have not made such showing — on either level of inquiry. Their presentation here and below of the apparent division of authority concerning the legal issue they want this Court to leap to decide constitutes a conclusive admission that their petitions do not present even an arguable case for mandamus to be ordered by this Court after full review.

The Ninth Circuit's order summarily denying mandamus cited, without comment, *Bauman v. United States District Court*, 557 F.2d 650, 654 (9th Cir. 1977), which holds, *inter alia*, that mandamus will not lie unless the district court's decision (a) was "clearly erroneous as a matter of law"; *and* (b) involved an important issue of first impression. Petitioners admit that they cannot satisfy

the first prong of this test, and they come close to admitting that they cannot satisfy the second prong.

Thus petitioners admit there is ample authority, albeit they disagree with it, supporting the district court's refusal to apply the California "privilege" (discovery prohibition) in federal question cases such as this one. This presumptively means the district court's decision cannot have been clearly erroneous as a matter of law. *See* cases discussed in Hospital Pet. 17-18; 20-23 (privilege "has had an ambiguous existence, neither uniformly adopted nor rejected" — at p. 21)) and Schug Pet. 13-16 ("the circuit courts have not treated the medical peer review privilege uniformly" — at p. 13).

Petitioners' presentations of pro and con cases in these sections of their brief are not as even-handed as they appear because the actual weight of federal on the medical peer review privilege tilts substantially further against it than petitioners' skewed case selection suggests. Nevertheless, petitioners have presented enough federal authority contra the privilege to foreclose the argument that the district court's order was clearly erroneous or an abuse of discretion.

Of course, the only reason petitioners were even-handed to any extent was their understandable desire to convince this Court that there is a sufficiently material difference of opinion in the lower courts to warrant Supreme Court review under the "conflict" criterion for certiorari. But, again, they have tried to leap a vast canyon in two successive jumps. The primary issue presented by *this* case, as opposed to the theoretical case

petitioners would like to generate for the Court's consideration, is whether the district court abused its discretion and whether the Ninth Circuit further abused its own discretion in not ruling, by mandamus, that the district court abused its discretion.

Petitioners are apparently correct that none of the published privilege cases to date (the instant district court opinion is unpublished just like the Ninth Circuit's order) has arisen under the particular federal law — EMTALA — at issue here. But that does not indicate that any truly novel issue of first impression is presented that would justify the extraordinary remedy of mandamus. In light of the breadth of federal question cases in which the purported peer review privilege has been discussed — and mostly denied application — no particular novelty or new analysis is required merely because EMTALA is the federal law involved here. Indeed, the claimed privilege under EMTALA is on all fours with a similar privilege claim under another federal statute, the Health Care Quality Improvement Act of 1986, which has been definitively rejected by at least six federal courts (indicated by parenthetical references to HCQIA in case list below).

Under Ninth Circuit authority, the absence of clear legal error was, alone, fatal to their request for mandamus. *Calderon v. United States District Court*, 98 F.3d 1102, 1105 (9th Cir. 1996); *Survival Systems of Whittaker Corp. v. United States District*, 825 F.2d 1416, 1418 n.1 (9th Cir. 1987) (the novelty or first impression test is irrelevant where no showing that court below was clearly erroneous). As Ninth Circuit Judge Dorothy Nelson points out in the leading Ninth Circuit practice guide: "[E]ven in

privilege cases, the court usually will intercede by mandamus only where petitioner can demonstrate clear error. *See Heathman v. United States District Court*, 503 F.2d 1032, 1035 (9th Cir. 1974) (petition denied where no clear error); *In re Grand Jury Subpoena Issued to Bailin*, 51 F.3d 203, 206 (9th Cir. 1995) . . . " Nelson, Goelz & Watts, *Ninth Circuit Civil Appellate Practice*, Sec. 13:168, p. 13-22.

That the district court's refusal, in this EMTALA case, to accord petitioners the benefit of California's peer review privilege is contrary to no published precedent by itself indicates, under Ninth Circuit authority, that the court's action cannot have been clearly erroneous. *See Wilson v. United States District Court*, 103 F.3d 828, 830 (9th Cir. 1996). Particularly when there is no contrary Ninth Circuit authority, and the ruling is consistent with decisions in other circuits, as the district court's was, the clear error standard cannot be met. *King v. United States District Court*, 16 F.3d 992, 993 (9th Cir. 1994).

While petitioners' effective admissions that the district court's order was neither an abuse of discretion nor clearly erroneous should be sufficient to foreclose mandamus and thus require denial of certiorari, we emphasize that petitioners' briefs present a misleading impression that the weight of legal authority pro and contra their position is more or less the same. In fact, federal privilege law is overwhelmingly hostile in general to new privileges not recognized as part of the common law in the original draft of the Federal Rules of Evidence and, specifically, to the purported peer review privilege.

In *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182, 110 S.Ct. 577 (1990),

a *unanimous* Supreme Court refused to recognize a state law peer review privilege with regard to university faculty evaluations. The Court strongly reiterated the long-standing rule that privileges are disfavored in federal practice, and that any privilege must be strictly construed, because "testimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence.' " 493 U.S. at 189.

The Court considered all the arguments that petitioners here present, *i.e.*, that their interest in protecting the confidentiality of sensitive peer review materials outweighs plaintiffs' need for the evidence, that the evidence sought can be obtained through other means, that doctors (professors there) have relied on the privilege, and that it is unlikely they would honestly evaluate their colleagues in its absence. *Id.* at 192-93. The Court acknowledged that these concerns have some merit, but bluntly decided that the federal interest in remedying discrimination, and revealing evidence related to that purpose, is more important. *Id.*

Similarly, Congress' concern, under EMTALA, to curtail abuse of patients at hospital emergency rooms also is presumptively more important. Indeed, this Court was concerned that acceptance of the peer review privilege for faculty evaluations "would also lead to a wave of similar privilege claims by other employers who play significant roles in furthering speech and learning in society," *id.* at 585 — a group that obviously includes hospitals and doctors.

That Supreme Court decision both reflects, and further encourages, the overwhelming tide of federal court hostility to recognition both of the medical peer review privilege specifically and, generally, of new privileges that were unknown to prior federal common law but which were sought to be imported from state law or even from general legal scholarship. This true picture of the landscape of the case law refutes petitioners' hyperbolic rhetoric that the district court's unpublished order here has caused some *sui generis* breach in the sanctity of a universally-recognized (all 50 states, as both put it) peer review privilege that doctors have, supposedly, long comfortably counted upon to exist and be enforced.

A partial list of federal cases refusing to apply the medical peer review privilege to bar discovery follows. (Cases, referred to above, that refuse to recognize the peer review privilege under the Health Care Quality Improvements of Act of 1996, a federal statute on all fours with EMTALA, are noted in parentheticals as "HCQUIA.") *Wei v. Bodner*, 127 F.R.D. 91 (D.N.J. 1989), (HCQUIA case); *Robertston v. Neuromedical Center*, 169 F.R.D. 80 (M.D. La. 1996) (HCQUIA); *Pagano v. Oroville Hospital*, 145 F.R.D. 683 (E.D. Cal. 1993) (HCQUIA); *LeMasters v. Christ Hospital*, 791 F.Supp. 188, 191 (S.D. Ohio 1986) (HCQUIA); *Manthe v. Vanbolden*, 133 F.R.D. 497 (N.D. Tex. 1991) (HCQUIA); *Teasdale v. Marin General Hospital*, 138 F.R.D. 691, 694 (N.D. Cal. 1991) (HCQUIA); *Robinson v. Magovern*, 83 F.R.D. 79 (W.D. Pa. 1979); *Ott v. St. Luke Hospital*, 522 F.Supp. 706 (E.D. Ky. 1981); *Todd v. South Jersey Hospital System*, 152 F.R.D. 676, 683 (D.N.J. 1993); *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058, 1062-63 (7th Cir. 1981); *United States v. Illinois*,

148 F.R.D. 587, 588-89 (N.D. Ill. 1993); *Smith v. Alice Peck Day Memorial Hospital*, 148 F.R.D. 51, 56 (D.N.H. 1993); *Jiricko v. Coffeyville Memorial Hospital Medical Center*, 700 F.Supp. 1559, 1564 (D. Kan. 1988); *Doe v. St. Joseph's Hospital*, 133 F.R.D. 677, 680 (N.D. Ind. 1987); *Quinn v. Kent General Hospital*, 617 F.Supp. 1226, 1245 (D. De. 1985); *Schafer v. Parkview Memorial Hospital*, 593 F.Supp. 61, 65 (N.D. Ind. 1984); *Dorsten v. Lapeer County General Hospital*, 88 F.R.D. 583, 586 (E.D. Mich. 1980).[1]

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[1] A similar tide of federal authority has rejected federal application of state privileges in cases other than medical peer review. A by no means exhaustive list includes: *United States v. Wilson*, 960 F.2d 48, 50 (7th Cir. 1992) (refusing to apply state unemployment claims privilege); *In re Grand Jury Proceedings*, 5 F.3d 397, 402-03 (9th Cir. 1993) (no to state privilege for votes on academic promotions); *In re International Horizons, Inc.*, 689 F.2d 996, 1004-05 (11th Cir. 1982) (no to state accountant-client privilege); *FTC v. TRW*, 628 F.2d 207, 210 (D.C. Cir. 1980) (no to self evaluation privilege against federal agency subpoena); *Memorial Hospital for McHenry County v. Shadur*, 664 F.2d 1058, 1061 (7th Cir. 1981) (no to state medical peer review privilege; *Hancock v. Dodson*, 958 F.2d 1367, 1373 (6th Cir. 1992) (no to state doctor/patient privilege); *United States v. One Parcel of Property Located at 31-33 York Street*, 930 F.2d 139 (2d Cir. 1991) (no to state privilege re erased arrest records); *Sexton v. Poole Truck Lines, Inc.*, 888 F.Supp. 127 (M.D. Ala. 1994) (no to state privilege re sealed driving records); *Equal Employment Opportunity Commission v. Illinois Dep't of Employment Security*, 995 F.2d 106, 109 (7th Cir. 1993) (no to state privilege re unemployment hearings); *Linde Thomason Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corporation*, 5 F.3d 1508, 1514-15 (D.C. Cir. 1993) (no to state insured-insurer privilege); *Dowling v. American Hawaii Cruises, Inc.*, 971 F.2d 423 (9th Cir. 1992) (no to state privilege for safety review meetings).

To be sure, petitioners here, as below, purport to rely upon some of these same cases by attempting to distinguish them as being only *apparently* adverse authority. Their theory is that in listed cases where the gravamen was not, at least directly, improper patient care — *e.g.*, antitrust or discrimination cases — discovery notwithstanding the state peer review privilege could be justified because these purported violations happened "in" the peer review process itself, as opposed to the violations merely being analyzed by the peer review process.

This argument is unpersuasive for two reasons. First, regardless of the purported distinction, the upshot is that court after court has ordered discovery of peer review information. No matter what the theory, such discovery obviously is so common that no reasonable doctor could truly have relied on the supposed immunity from discovery of peer review records. Yet this frequent knowledge and fact of discovery has not caused the medical care system to collapse as the petitions say will happen because of the discovery ordered in this case.

Second, as we showed in the Statement of the Case, the purported distinction between those cases and the instant case does not actually exist. Or, even if it does arguably exist, that issue is not fit for review by the Supreme Court.

The *primary* ground for the district court's order, as we explained, was that sufficient evidence supported plaintiff's contention that relevant misconduct *did* happen "in" the peer review process itself. That alone takes the case out of the fact pattern petitioners have invented in their attempt to obtain certiorari. (That pattern, again, is

one where the peer review records contain nothing more than straight commentary by doctors about each other's performance). This determination by the district court was based upon its knowledge of the record in this case, which is a matter especially within its zone of discretion. It probably would not be appropriate for Supreme Court review even on a properly presented appeal after final judgment. It *certainly* is not appropriate for Supreme Court intervention on an interlocutory basis.

B. There Is *No* Intercircuit Split On the Question Whether A Party Who is Not the Target of Discovery In a Civil Case Has The Right to Automatic Appeal Of An Interlocutory Discovery Order Directed At Another Party, Particularly Where the Other Party Is Able and Motivated to Contest the Discovery Order Itself, Whether By Petition for Mandamus, as Has Already Occurred Here, Or Subsequently By Suffering Contempt and Then Appealing the Contempt Ruling.

Although the Hospitals' and Schug's petitions for mandamus were and are unmeritorious, defendants were entitled to bring them and to make their arguments to the Ninth Circuit and to the Supreme Court. Those petitions did not halt all progress in the litigation of the civil suit in the district court. Although the Ninth Circuit issued a stay, which remains in effect, of the order for discovery of the peer review records, that did not prevent any other case proceedings from going forward in the district court.

But Schug's separate appeal was fraudulent misconduct from the beginning, which has now been exacerbated by a fraudulent presentation to this Court of an entirely nonexistent "intercircuit split" in the authority applicable to interlocutory appeals of discovery orders in civil cases. This improper appeal had, and continues to have, precisely the devastating "freezing" effect on the entire civil case, prevention of which is the underlying rationale for the important statutory and case law policy against piecemeal interlocutory appeals. The appeal, unlike the mandamus petitions, caused the case file to be transferred from the district court to the Ninth Circuit, thereby depriving the district court of jurisdiction to move the case forward through remaining motions to a trial date. This freeze has lasted for a year now, and will continue while the certiorari petition as to the appeal is pending.

28 U.S.C. Sec. 1291 gives the courts of appeal jurisdiction over appeals solely from final decisions of district courts, which do not include interlocutory discovery orders. Section 1292(b), however, provides a discretionary avenue to obtain immediate appellate relief from an allegedly oppressive discovery (or other) order: Asking the district court to certify the order for immediate appeal.

Schug omits from his fact statement the crucial information that his trial court law firm did file a motion, including memorandum of law, on June 1, 1998 for Sec. 1292(b) certification of the district court's order. *See* excerpt from district court docket sheet, attached hereto as App. A. However, the attorney in the firm who filed those papers apparently was unaware that a different

attorney in the firm had been told by the district judge at a status conference three days earlier that if such motion were presented, the court would not be inclined to grant it. *See* declaration of respondents' counsel, attached hereto as App. B. This information induced Schug's counsel on June 4, 1998 to withdraw the motion for Sec. 1292(b) certification. *See* App. A.

But instead of the withdrawal's terminating interlocutory appellate proceeding in this case, Schug's counsel, despite obvious awareness that discretionary certification was the proper and sole remedy for immediate relief, replaced their certification motion with a notice of appeal as of right under Sec. 1291. *See* App. A (entry for June 3, 1998). They persist in that improper venture to this very day.

Not a single case cited in Schug's petition (pp. 21-26) supports the theory that a party in a *civil* case has a right to automatic interlocutory of a discovery order that supposedly affects him, but which is directed at another party in the same case who holds the documents and other information sought. Moreover, such interlocutory appeal is particularly inappropriate where, as here, the other party is fully motivated to contest the order and is indeed vigorously contesting the order. Such an appeal, which violates basic black letter federal doctrine against piecemeal appeals, is not supported by *Perlman v. United States*, 247 U.S. 7 (1918), or any other authority.

The Ninth Circuit summarily dismissed the appeal based on its own prior authority, *In re National Mortgage*

Equity Corp., 857 F.2d 1238 (9th Cir. 1988), which explained why neither *Perlman* nor any other case supports a right to appeal a civil discovery order in that situation. This Ninth Circuit decision, however, broke no new ground nor is it contrary to any case from any other circuit.

The Ninth Circuit explained that it, like the Supreme Court and some other circuits, had previously permitted interlocutory appeals by parties who claimed potential adverse impact of disclosures by a third party, one *not* a party to any ongoing civil case, who had been served with a grand jury subpoena. 857 F.2d at 1240, citing *Gravel v. United States*, 408 U.S. 606, 608 n.1 (1972); *In re Grand Jury Proceeding (Schofield)*, 721 F.2d 1221 (9th Cir. 1983); *In re Grand Jury Subpoena Duces Tecum (Marger)*, 695 F.2d 363 (9th Cir. 1982); *In re Gren*, 633 F.2d 825 (9th Cir. 1980); *Harris v. United States*, 413 F.2d 316 (9th Cir. 1969).

The Ninth Circuit also cited, and endorsed, a different basis for immediate appeal "where the aggrieved party's motion or petition is the only pending proceeding in any federal court," a situation that, of course, does not exist where that party opposes a discovery order directed at another party in an ongoing civil case. *See* 857 F.2d at 1240, citing *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 514 (1975) (motion in district court to quash U.S. Senate subpoena directed at third party); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 356 (1931) (no criminal case pending when motion was made); *Burdeau v. Powell*, 256 U.S. 465 (1921) (same); and several other cases to the same effect.

The Ninth Circuit's opinion cast no doubt on the viability of all these cases as applications of the so-called *Perlman* exception to non-appealability of interlocutory discovery orders or subpoenas, contrary to Schug's preposterous claim that the opinion construes the exception so narrowly that it "essentially eliminates" it. (Schug Pet. 22.) Rather, the Ninth Circuit correctly explained that a case like the instant one is fundamentally different:

> "The reason for allowing [interlocutory] review of such orders in the grand jury context is that there are aspects of independence from the main course of any prosecution that render the order collateral. . . . We are persuaded that any aspect of independence is lost in an ongoing civil case where a party is aggrieved by a district court discovery order. The essential character of any litigation over a discovery order and the circumstances under which the order is issued, as in this case, render it merely a step in the civil proceeding." 857 F.2d at 1240.

All the cases cited in Schug's petition, from every circuit, are entirely consistent with the Ninth Circuit's endorsement of immediate appealability (the "*Perlman* exception") in the instances described, while recognizing that its rationale does not extend to discovery orders directed at civil litigation parties. The most thorough explanations are two First and Second Circuit opinions that Schug cites for some peculiar reason, even though they definitively reject his precise argument for automatic right of appeal.

In *Corporacion Insular De Seguros v. Garcia*, 876 F.2d 254 (1st Cir. 1989), the court explains why it *rejected* a party's claim that the *Perlman* case gave him the right to

appeal a discovery order directed at another party. *Id.* at 258-59. The First Circuit relied upon Judge Friendly's opinion in *National Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F.2d 174, 178 (2d Cir. 1979), the other case cited by Schug.

Judge Friendly gave perhaps the most thorough explanation extant of why the *Perlman* case has nothing to do with discovery orders in civil cases. The point is very simple, but Schug muddles it by making a crucial error in describing the key facts in *Perlman*.

Schug's petition claims the grand jury subpoena to which Mr. Perlman objected was directed at his "bookkeeper." Schug Pet. 22. The implication is that even though the bookkeeper was not a party to ongoing civil litigation, the situation was sufficiently similar to the relationship between doctor and hospital that if Perlman could take an interlocutory appeal, despite that he was not the target, then so should Schug.

But the subpoena was *not* directed at Perlman's "bookkeeper"! Rather, it was directed at the clerk of the U.S. District Court in New York who was holding some sensitive documents of Perlman's company that had been exhibits in a prior proceeding. 247 U.S. at 8-10. *The whole point of the Perlman case was that a subpoena directed to such a completely uninvolved and obviously unmotivated and disinterested third party created a special situation because such person would have no wish or motive to contest it on behalf of the party who might be injured by the disclosure.* That is why the First Circuit in *Corporacion Insular*, and Judge Friendly in *National Super Spuds*, distinguished *Perlman* "as a 'unique case' in which there was no relation between the

holder of the privilege (Perlman) and the target of the court's order (the clerk of the district court)." 876 F.2d at 259; 591 F.2d at 180.[2]

In sharp contrast, where a relationship — whether of employment, self-interest, or otherwise — does exist, the target of the subpoena "may reasonably be expected to risk a contempt citation in order to preserve both his own and his employer's right to appellate review of their joint claim of privilege." 876 F.2d at 260. Judge Friendly expounded at greater length to the same effect. *See* 591 F.2d at 179-180.

These opinions, though they do not cite it, were in fact following the Supreme Court's decision in *United States v. Ryan*, 402 U.S. 530 (1971). This Court explained that the basic rationale of *Perlman* was that "the custodian [of Perlman's records] could hardly have been expected to risk a citation for contempt in order to secure Perlman an opportunity for judicial review." *Id.* at 533.

That situation is so far removed from the instant case as to render Schug's petition on the appeal simply absurd. It would be difficult to imagine a more motivated and effective subpoena or discovery order target, both in theory and in fact, than the Hospital petitioners herein. In theory, because they obviously have an even broader and

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[2] The court in *Corporacion Insular* also explains why Schug's citation to *Nixon v. Sirica*, 487 F.2d 700, 707 (D.C. Cir. 1973), is irrelevant. The reason, of course, is the obvious one: "But *Nixon* was a unique case, and we do not believe that the court meant to extend it to any government official other than the President himself." 876 F.2d at 257, citing *In re Attorney General of the United States*, 596 F.2d 58, 62 (2d Cir. 1979).

more profound claimed interest than Schug in the confidentiality of their records. He alleges potential embarrassment to himself alone. But no matter how bad that might be, it hardly can compare with the Hospital's sweeping claim that discovery will destroy the entire system of peer review that it alleges is fundamental to its services.

The Hospital also is motivated and effective *in fact* because it has indeed vigorously pursued its mandamus petition, sparing no effort or legal expense. Whether it will suffer contempt in order to obtain further appellate review (on a *legitimate* basis this time) remains to be seen. But Dr. Schug cannot plausibly say that the Hospital is less than fully motivated and capable of doing so.

All of Schug's remaining citations similarly fail to support either his substantive argument or his argument for certiorari based on purported intercircuit conflict. We dispose of them briefly.

Boughton v. Cotter Corp., 10 F.3d 746 (10th Cir. 1993), is perhaps Schug's strangest citation because its flat rejection of interlocutory appeal of the discovery order in that civil case is entirely consistent with the Ninth Circuit's same holding in *In re National Mortgage Equity Corp., supra*, and thus in the instant case as well. The courts cite numerous other cases, also consistent with the Ninth Circuit, noting that "in virtually every case in other circuits involving similar attorney-client privilege claims, the courts have refused to take [appellate] jurisdiction." 10 F.3d at 749-50.

Even more remarkably, the Tenth Circuit in *Boughton* delivers the coup de grace to Schug's misconceived theory that the *Perlman* exception permits his immediate appeal. The court observed that defendants there did "not [even] rely on *Perlman* and deny application of these [grand jury subpoena cases], arguing that they involve grand jury criminal investigations"! *Id.* at 749-50 n.2. Schug's attorneys should have had the integrity to take the same position instead of vainly pursuing their improper appeal.

In re Grand Jury Investigation of Ocean Transportation, 604 F.2d 672 (D.C. Cir. 1979), was not only a grand jury case just like those distinguished by the Ninth Circuit, and every other circuit, from ongoing civil litigation, but the privilege, even if it had once existed, had been effectively waived. *In re Faltico*, 561 F.2d 109 (8th Cir. 1977), similarly involved a grand jury subpoena directed at a non-party "who could not be expected to expose himself to the penalty of contempt in order to obtain appellate review," precisely because his non-party status gave him no particular stake in the litigation or interest in the aggrieved party's complaint about the discovery. *Schwimmer v. United States*, 232 F.2d 855, 860 (8th Cir. 1956), was by Schug's own description a similar grand jury subpoena directed at non-party with no interest in resisting it. Similarly, all the cases cited in footnotes 30, 31, 32, and 36 of Schug's petition (p. 24) are also grand jury subpoena cases, are entirely consistent with the Ninth Circuit's decision on which dismissal of the instant appeal was based, and are thus irrelevant because they establish no "intercircuit conflict."

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The subpoena in *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993 (10th Cir. 1965), was indeed issued in a civil case, but it went to a non-party witness. Schug overlooks that this makes that case quite different from the instant case. The non-party target of the subpoena there was the very one who brought the appeal, unlike Schug who claims the right to appeal even though he is *not* the target of the discovery. *Id.* at 996. It was the combination of being both a non-party and the target that created the right to appeal: "The appellants, as nonparties to the main suit, will have no right to appeal from a judgment therein. The trial court's order [will be] final as to these appellants." *Id.*

Finally, *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 877-78 (5th Cir. 1981), is irrelevant because it involved the distinguishable situation of the Government's special right to interlocutory appeal in some discovery contexts.

Accordingly, the law on the appeal matter is settled, it is consistent throughout the nation, there certainly is no "intercircuit conflict," and Schug's argument in this part of his petition is utterly without merit, either as to worthiness for certiorari or as to legal substance.

III.

CONCLUSION

For the reasons given above, the petitions for certiorari should be denied.

Dated: May 5, 1999

Respectfully submitted,

LAW OFFICES OF JAMES BRADEN

JAMES BRADEN
44 Montgomery Street, Suite 1210
San Francisco, CA 94104
(415) 398-6865
Counsel for Respondents

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID BURROWS, et al. Plaintiff(s), (Petitioner) v. REDBUD COMMUNITY HOSPITAL DIST., et al. Defendant(s), (Respondent)	Court of Appeals Docket No. 98-70610 Docket Number(s) of Court of Appeals Companion and/or Cross Appeals (if known) 98-70616 District Court Docket Number C 96-4345 SI Date Transcript(s) Filed: no transcripts designated

CERTIFICATE OF RECORD

This certificate is submitted in conformance with Rule 11-2 of the Local Rules of the U.S. Court of Appeals for the Ninth Circuit. The record on appeal, consisting of the trial transcript (if any) and the trial court clerk's record, is ready for the purposes of the appeal. This record is available in the Clerk's Office of the U.S. District Court identified below.

The documents comprising the trial court clerk's record have been numbered in conformance with Rule 11(b) of the Federal Rules of Appellate Procedure. These document numbers are reflected on the U.S. District Court docket sheet and should be used for reference purposes in the briefs.

The actual filing date for this document in the U.S. Court of Appeals will initiate the briefing schedule in civil cases (including habeas corpus cases). All parties in civil cases will receive separate notification of this filing date. In criminal cases, the briefing schedule is set by a Time Schedule Order from the U.S. Court of Appeals.

DATED: July 16, 1998

Office of the
Clerk
U.S. District Court
Northern District of
California
450 Golden Gate
Ave., Box 36060
San Francisco, CA 94102

RICHARD W. WIEKING
CLERK

/s/ Cora G. Delfin

by: Cora Delfin
Deputy Clerk

Proceedings include all events.
3:96cv4345 Burrows, et al. v. Redbud Community Hos, et al.

APPEAL

6/1/98 161 ***NOTICE by defendant Dr. Wolfgang Schug's request for certification of order for appeal. [3:96-cv-04345] (cgd) [Entry date 06/03/98]***

6/1/98 162 ***MEMORANDUM OF POINTS AND AUTHORITIES by defendant Wolfgang Schug in support of notice [161-1] [3:96-cv-04345] (cgd) [Entry date 06/03/98]***

6/3/98 163 LETTER dated 6/1/98 from John S. Gilmore for Adventist Health Inc in response to letter from plaintiff's counsel dated 5/26/98. [3:96-cv-04345] (cgd) [Entry date 06/05/98]

6/3/98 164 LETTER dated 6/2/98 from Redbud Community Hospital District in response by plaintiff's attorney, Richard Massa dated 5/26/98. [3:96-cv-04345] (cgd) [Entry date 06/05/98]

6/3/98 165 MINUTES: (C/R N/A) (Hearing date: 5.29.98) Further case management conference – Held. Motion for leave to file amended complaint – Submitted. Discovery cutoff extended to 7/24/98; Expert Discovery cutoff extended to 6/26/98. Motion for leave granted and plaintiff to file amended complaint next week; request for order shortening time submitted; Defendants to respond to submitted letter not later than 6/2/98. Court to issue order re 1157 issues; Defendants request for one

[Boldface emphasis added by respondents]

week continuance for expert disclosure granted. [3:96-cv-04345] (cgd) [Entry date 06/05/98]

6/3/98 171 NOTICE OF APPEAL by defendant Wolfgang Schug, M.D., defendant JJ&R Emergency Mgmt (sued erroneously as Emergency Medical Management Services, Inc. from Dist. Court decision order dated 5/5/98 [154-1] Fee status Paid, $105.00, receipt no. 131499. [3:96-cv-04345] (cgd) [Entry date 06/08/98]

6/4/98 166 LETTER dated 6/1/98 from Richard J. Massa re possible use of jury instructions discussed at the case mgmt conf. on 5/29/98. [3:96-cv-04345] (cgd) [Entry date 06/05/98]

6/4/98 167 LETTER dated 6/2/98 from Matthew P. Miller re discovery disputes. [3:96-cv-04345] (cgd) [Entry date 06/05/98]

6/4/98 168 LETTER dated 6/3/98 from Sonja M. Dahl to Mr. Massa. [3:96-cv-04345] (cgd) [Entry date 06/05/98]

6/4/98 169 LETTER dated 6/4/98 from Thomas J. Donnelly for Redbud Community Hospital re a petition for writ be filed with the Appellate Court regarding the Evidence Code 1157 issues. [3:96-cv-04345] (cgd) [Entry date 06/05/98]

6/4/98 170 NOTICE by defendant of withdrawal of request for certification. [3:96-cv-04345] (cgd) [Entry date 06/05/98]

Docket as of July 16, 1998 11:47 a.m.

[Boldface emphasis added by respondents]

APPENDIX B

MASSA & ASSOCIATES

Attorneys At Law
120 North Forbes Street
Lakeport, California 95453

Telephone: (707) 262-0230
Fax: (707) 262-1028

January 15, 1999

DECLARATION OF RICHARD J. MASSA

I, RICHARD J. MASSA, declare:

I am an attorney at law admitted to practice before the United States District Court for the Northern District of California and the Ninth Circuit Court of Appeals, am the attorney of record and primarily responsible for filing, preparation and trial of the case of *Burrows, et al., v. Redbud Hospital, et al.*, No. C-96-4345 SI, in the United States District Court, Northern District of California.

I have been personally present at every hearing and conference held on this matter in the trial court, specifically including the Case Management Conference of May 29, 1998, held before the Honorable Susan Illston, District Judge.

At no time during the May 29, 1998, Case Management Conference, or at any other time, in my presence or to my knowledge, did Judge Illston "instruct" defendant SCHUG, et al., or counsel for defendant SCHUG, et al., to "withdraw" a request for certification of any order for appeal.

With regard to the Case Management Conference held in this matter on May 29, 1998, the only relevant

comment of Judge Illston with regard to this matter that declarant recalls was to the effect that if a request for certification were to be made, the Court would not be inclined to grant such a request.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: January 15, 1999 /s/ Richard J. Massa
RICHARD J. MASSA

MOTION FILED
MAY 5 1999

(3) (4)

Nos. 98-1513 and 98-1526

In The

Supreme Court of the United States

REDBUD COMMUNITY HOSPITAL,
ADVENTIST HEALTH, INC.,

Petitioners,

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, DAVID BURROWS, RHODA THOMAS,

Respondents.

and

WOLFGANG SCHUG, M.D.,

Petitioner,

vs.

DAVID BURROWS, successor-in-interest to Cody Burrows, deceased; DAVID BURROWS and RHODA THOMAS individually and as heirs and surviving parents of Cody Burrows,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE CALIFORNIA MEDICAL ASSOCIATION, CALIFORNIA HEALTHCARE ASSOCIATION, CALIFORNIA ACADEMY OF FAMILY PHYSICIANS, AMERICAN MEDICAL ASSOCIATION, AMERICAN COLLEGE OF EMERGENCY PHYSICIANS AND ITS CALIFORNIA CHAPTER, AND JOINT COMMISSION ON ACCREDITATION OF HEALTHCARE ORGANIZATIONS IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

CATHERINE I. HANSON
Counsel of Record
221 Main Street, P.O. Box 7690
San Francisco, California 94120-7690
Telephone: (415) 882-5144
Fax: (415) 882-5143
Counsel for Amici Curiae

May 1999

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND *AMICI CURIAE BRIEF* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

The California Medical Association, the California Healthcare Association, the California Academy of Family Physicians, the American Medical Association on its own behalf and on behalf of the 45 state medical associations which comprise the American Medical Association/ State Medical Society Litigation Center, the American College of Emergency Physicians and its California Chapter, and the Joint Commission on Accreditation of Healthcare Organizations (*"amici"*) hereby respectfully move for leave to file the attached brief of *amici curiae* in support of petitioners' Petitions for Writ of Certiorari in this case. The consent of the attorneys for the petitioners have been obtained. Respondents have refused to consent. The letters of consent we did receive have been filed separately with the court in this case.

All of *amici* are committed to, among other things, assuring the quality of health care in this country. The interest of *amici* in this case arises from the fact that the holdings below threaten confidentiality protections for peer review records and proceedings, and therefore threaten the quality of health care delivered in this country. Medical peer review is essential to assure physicians and other health care providers deliver quality health care and is interwoven throughout the health care licensing and accreditation standards, such as those promulgated by *amicus* Joint Commission and Accreditation of Healthcare Organizations. Any holding that fails to apply confidentiality protections for records or proceedings of

medical peer review bodies threatens to chill the willingness of practitioners to become involved in the evaluative process so essential to successful peer review.

Amici move for leave to file this brief in support of the Petition for Writ of Certiorari in order to more fully describe the medical peer review system in operation throughout the nation and highlight the potential crippling effects the lower court's ruling will have, if left to stand, on its successful functioning.

Respectfully submitted,

CATHERINE I. HANSON
Attorney for:
California Medical Association
California Academy of Family Physicians
California Healthcare Association
American College of Emergency Physicians and its California Chapter
American Medical Association on its own behalf and on behalf of 45 State Medical Associations
Joint Commission on Accreditation of Healthcare Organizations

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BRIEF OF *AMICI CURIAE*

This brief of *amici curiae*[1] is filed in support of the Petition for Writ of Certiorari filed by Wolfgang Schug, M.D., Redbud Community Hospital and Adventist Health, Inc. and is submitted on behalf of the California Medical Association, the California Healthcare Association, the California Academy of Family Physicians, the American Medical Association and the forty-five state medical associations and societies that are members of the AMA State National Society Litigation Center, the American College of Emergency Physicians and its California chapter, and the Joint Commission on Accreditation of Healthcare Organizations (herein referred to collectively as *"amici"*).

INTEREST OF *AMICI CURIAE*

The California Medical Association (CMA) is a nonprofit incorporated professional association of more than 30,000 physicians practicing in the state of California. CMA's membership includes most of the California physicians who are engaged in the private practice of medicine,

[1] All the parties except Respondents have consented to the filing of this brief. The letters of consent from all of the Petitioners have been filed with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. A draft of the brief was submitted to counsel for petitioner Wolfgang Schug, M.D., for review and comment. No person or entity, other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

in all specialties. The CMA's primary purposes are: " . . . to promote the science and art of medicine, the care and well-being of patients, the protection of the public health, and the betterment of the medical profession. . . . "

The California Healthcare Association (CHA) is a non-profit trade association representing more than 540 hospitals. CHA membership includes public, private, non-profit and proprietary hospitals which are required by law to maintain medical staffs which engage in peer review. CHA is dedicated to serving the public's health care needs.

The California Academy of Family Physicians (CAFP) is a medical specialty society with more than 6,800 members. The mission of CAFP is to enhance, strengthen, and promote the specialty of family medicine, to promote professional and personal growth for its members, and to advocate for family centered care for all Californians. Family physicians are residency-trained primary care specialists who are able to treat a wide variety of illnesses and conditions and coordinate the care their patients receive from other physicians. Family physicians play an essential role in today's health care system, and are more likely to locate their practices in urban or rural underserved areas than physicians in other medical specialties.

The American College of Emergency Physicians (ACEP) is the largest national professional organization representing the specialty of emergency medicine with more than 19,800 members. ACEP exists to support quality emergency medical care and to promote the interests of emergency physicians. The California Chapter of ACEP ("CAL/ACEP") is by far the largest state chapter

of emergency physicians with almost 2000 members practicing in approximately 400 hospitals.

The American Medical Association (AMA), a nonprofit corporation, is an association of approximately 275,000 physicians who practice throughout the United States. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these still remain its core purposes. Its members practice in all fields of medical specialization, and it is the largest medical society in the United States.

The AMA files this brief as a representative of the American Medical Association/State Medical Society Litigation Center ("Litigation Center"). The Litigation Center was formed in 1995 as a coalition of the AMA and private, voluntary, nonprofit state medical societies to represent the views of organized medicine in the courts. Forty-five state medical societies join the AMA as members of the Litigation Center. The member organizations, in addition to the AMA, are: Medical Association of the State of Alabama, Alaska State Medical Association, Arkansas Medical Society, California Medical Association, Colorado Medical Society, Connecticut State Medical Society, Medical Society of Delaware, Medical Society of the District of Columbia, Florida Medical Association, Medical Association of Georgia, Hawaii Medical Association, Illinois State Medical Society, Indiana State Medical Association, Iowa Medical Society, Kansas Medical Society, Kentucky Medical Association, Louisiana State Medical Society, Maine Medical Association, Massachusetts Medical Society, Michigan State Medical Society, Minnesota Medical Association, Mississippi State Medical Association, Missouri State Medical Association, Montana

Medical Association, Nebraska Medical Association, New Hampshire Medical Society, Medical Society of New Jersey, New Mexico Medical Society, Medical Society of the State of New York, North Carolina Medical Society, North Dakota Medical Association, Ohio State Medical Association, Oklahoma State Medical Association, Oregon Medical Association, Pennsylvania Medical Society, Rhode Island Medical Society, South Carolina Medical Association, Tennessee Medical Association, Texas Medical Association, Utah Medical Association, Vermont State Medical Society, Washington State Medical Association, West Virginia State Medical Association, State Medical Society of Wisconsin, and Wyoming Medical Society.

The Joint Commission on Accreditation of Healthcare Organizations ("JCAHO" or "Joint Commission") is the leading health care accrediting body in the world, evaluating and accrediting nearly 20,000 health care organizations and programs in the United States. An independent, not-for-profit organization, the Joint Commission is the nation's predominant standards-setting and accrediting body in health care. Since its founding in 1951, the Joint Commission has had one basic purpose: to improve the quality of care provided to the public through the provision of health care accreditation and related services that support performance improvement in health care organizations. The Joint Commission accredits almost 11,000 of the nation's hospitals and home health agencies, and more than 7,000 other health care organizations, including health care networks, clinical laboratories and ambulatory care, long term care and behavioral health care organizations. For more than four decades, the Joint Commission has developed state-of-the-art standards and

evaluated the compliance of health care organizations against them.

A. *Amici* CMA, CHA, CAFP, CAL/ACEP, AMA, ACEP and JCAHO Urge this Court to Grant the Petition for Writ of Certiorari in This Case.

Amici strongly support the petition in this case because it raises an issue of profound importance: the preservation of the system of confidential medical peer review which functions in every state in the nation to provide significant protection of the public health. This Court should grant review to create a federal medical peer review immunity, or in the alternative require as a matter of comity that deference always be granted to state-created peer review privileges in civil lawsuits alleging EMTALA or other violations of the standard of care. Discovery of medical peer review records must be prohibited in such cases, whether cloaked under EMTALA or other federal statutes, to assure the nations' system of medical peer review is not crippled by a loss of confidentiality. Such a ruling would also reduce the likelihood of plaintiffs forum shopping what are in essence medical malpractice cases recast under federal theories.[2]

In state courts, statutes like that at issue in this case, California Evidence Code Section 1157 ("Section 1157"),

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[2] *See, e.g. Barris v. County of Los Angeles*, 20 Cal. 4th 101, 83 Cal.Rptr. 2d 145 (1999) in which the California Supreme Court ruled that an EMTALA claim based on a failure to stabilize a patient's emergency medical condition, is "based on professional negligence" and thus subject to California's Medical Injury and Compensation Reform Act like any other case alleging medical malpractice.

prohibit civil discovery of medical peer review records. Section 1157 protects peer review information from disclosure through civil discovery as do similar state statutes throughout the nation. Creation of a federal medical peer review privilege against discovery, or a ruling requiring deference to state-created protections based on principles of comity, is absolutely necessary to avoid irreparable harm to the profoundly important public policy uniformly mandated by virtually all of the 50 state legislatures,[3] namely, that the confidentiality of the medical peer review system in operation throughout the country be protected. The protection of that system, and the crucial quality improvement functions it performs in the nation's hospitals and other health facilities, requires that records falling within the ambit of immunity statutes like Section 1157 not be subject to compelled disclosure in any civil proceedings, however denominated, challenging the quality of medical care provided.

B. Permitting Compelled Disclosure of Medical Peer Review Records in EMTALA Claims Would Profoundly Chill the Nation's Physicians' Willingness to Participate Candidly in Peer Review With Little or No Countervailing Benefit to the Search for Truth.

With at least the perception among members of the medical profession that increasing numbers of EMTALA

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[3] Recent case law in Kentucky appears to have diminished the confidentiality protections for peer review records and proceedings embodied in that state's peer review statute. *See Sisters of Charity Health Systems, Inc. v. Raikes (Dones)*, 984 S.W.2d 464 (1998).

cases are being filed,[4] the chilling effect the threat of compelled disclosure of peer review records in such cases on physicians' willingness to participate in candid and meaningful peer review becomes ever more pronounced. Physician participation as medical peer reviewers on hospital medical staffs and in other settings is generally an entirely volunteer endeavor, affording no additional pay, sometimes incurring lost income for time taken from practice, and offering little tangible reward other than the knowledge that the profession and patient safety are enhanced by continuous and rigorous peer review. Disclosure of peer review records for purposes of federal EMTALA cases (and any pendent state claims) raises the specter that peer review records containing candid critiques by identifiable physician reviewers will be placed into evidence for the world to see. The reluctance of physicians to "serve up" their hospitals and peers in this way is obvious and profound, particularly given the potential such information will be taken out of the collegial and constructive context in which it was offered, whether by the plaintiffs' attorneys or the subject physician. Indeed, notwithstanding broad immunities from liability for peer review communications, lawsuits brought by the affected health care providers are not unheard of when confidential communications are made public.[5] Such disclosures may also cause discord between people

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[4] *See, e.g., Roberts v. Galen of Virginia, Inc.*, 525 U.S. ___, 142 L.Ed.2d 648 (January 13, 1999) (Recovery for violation of EMTALA provision (42 U.S.C. § 1395dd(b)) held not to require proof that hospital acted with improper motive in failing to stabilize patient.)

[5] *See, e.g., Dorn v. Mendelzon*, 196 Cal.App.3d 933, 242 Cal.Rptr. 259 (1987).

who may of necessity continue working together very closely. Further, in the absence of a discovery immunity, more plaintiffs would seek to depose or call physician reviewers themselves to trial, adding further to the chilling effect on physician participation in the various states' medical peer review systems.

There is no countervailing evidentiary benefit which would justify this disruption. Peer review records sought by plaintiffs in cases challenging the quality of medical services provided are created by an evaluative process performed after-the-fact. In these cases, application of the immunity statute to prohibit access to peer review records does nothing to preclude plaintiffs' own evaluation of the evidence they gather elsewhere through discovery, such as the medical records. To deny the requested discovery is in no way inconsistent with Congress' goals in enacting EMTALA, or with other federal policy.

The public policy supporting the discovery immunity for medical peer review is thus far stronger than it was for the academic peer review at issue in *University of Pennsylvania v. Equal Employment Opportunity Commission*, 493 U.S. 182, 107 L.Ed. 2d 571 (1990). In cases alleging discriminatory faculty tenure decisions, the faculty peer review information may often be the best, if not the only evidence available to prove the claim. *See University of Pennsylvania v. EEOC*, 493 U.S. at 193; 107 L.Ed. 2d at 584-585. On the other hand, medical peer review information will be, at most, a potential source of secondary evidence in EMTALA and similar cases which do not challenge the fairness of the peer review process itself. Medical peer review information in such cases is much more like the after-the-fact psychotherapy records this

Court protected from discovery in *Jaffee v. Redmond*, 518 U.S. 1, 135 L.Ed. 2d 337 (1996). Indeed, this Court's admonition in the *Jaffee* case is equally applicable with respect to medical peer review: "[w]ithout a privilege, much of the desirable evidence to which litigators . . . seek access . . . is unlikely to come into being." *Jaffee v. Redmond*, 135 L.Ed. 2d at 346.

C. The Strong Public Policy Considerations Favoring Open and Candid Medical Peer Review Would Be Severely Frustrated if the States' Various Peer Review Immunity Statutes Could Be Bypassed by Filing in Federal Court.

Statutes like California Evidence Code Section 1157 promote important public policy considerations. Specifically, they reflect a recognition of two essential truths: (1) that diligent performance of medical quality assessment and peer review is essential to the public health, and (2) that medical quality assessment and peer review will fail in the absence of confidentiality. *See, e.g., Matchett v. Superior Court*, 40 Cal.App.3d 623, 115 Cal.Rptr. 317 (1974). In *Matchett*, a California appellate court noted the critical need for medical staff peer review committees in protecting the public by policing the profession, and supported the rationale for the discovery immunity stating:

> In an accredited hospital, the organized medical staff is responsible to the hospital governing body for the quality of in-hospital medical care; it evaluates the qualifications of applicants and holders of staff privileges; it recommends appointment, reappointment, curtailment and exclusion from staff privileges; it provides peer group methods for reviewing basic medical,

> surgical and obstetrical functions. [citations omitted] . . . [T]he quality of in-hospital medical care depends heavily upon the committee members' frankness in evaluating their associates' medical skills and their objectivity in regulating staff privileges. Although composed of volunteer professionals, these committees are affected with a strong element of public interest.
>
> * * *
>
> ***Section 1157 was enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity.*** It evinces a legislative judgment that the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality.

Matchett, supra, 40 Cal. App. 3d at 628-29; emphasis added.

The *Matchett* court thus found that:

> Section 1157 represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence.

Matchett, supra, 40 Cal.App.3d at 629.

Courts have repeatedly reaffirmed the need for medical peer review discovery immunities to insure that medical peer review be conducted with full candor, without the chilling threat of potential discovery of the peer review proceedings. For example, in *Alexander v. Superior Court,* 5 Cal.4th 1218, 23 Cal.Rptr.2d 397 (1993), the California Supreme Court noted that allowing discovery of peer review information submitted to medical staff committees from outside physicians would be detrimental to patients. As the Court stated:

> The immediately predictable result will be that physicians . . . will cease providing . . . negative information or constructive criticism. . . . Without this frank exchange of information, medical staffs will have no legal grounds upon which to initiate corrective action (such as restricting privileges or requiring monitoring or further education) that could be critical to the protection of patients. Clearly such a result would be contrary to the Legislature's intent in enacting Section 1157.

Alexander v. Superior Court, 5 Cal.4th at 1227-28, 23 Cal.Rptr.2d at 403.

The need to protect the confidentiality of medical peer review records from compelled discovery in civil litigation has also been recognized by federal courts. As discussed in the leading federal case recognizing a privilege for medical peer review:

> Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care. . . . Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.

Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D.D.C. 1970), aff'd, 479 F.2d 920 (D.C. Cir. 1973). *See also Weekoty v. United States*, 30 F.Supp.2d 1343 (D.N.M.) 1998.

These decisions are informed by the conclusion of Legislatures throughout the country that a comprehensive, ongoing system of rigorous medical peer review is

necessary to the health and welfare of the people of this nation. Indeed, such activity is a principal patient protection mechanism in hospitals throughout the country. A comprehensive quality assurance process is critical to the identification and resolution of potential or ongoing problems, as well as to the identification of opportunities to improve patient care. Protocols and procedures must be continuously analyzed and revised to reflect new information and technologies. Current assessment of the clinical performance of physicians and other health care providers is crucial in order to provide appropriate education and training where warranted and to identify impaired or deficient individuals *before* patients are injured.

To be effective, this review function must be performed by individuals who have the expertise necessary to evaluate the quality of medical care provided and the ability to implement remedial action in a timely manner. An effective medical peer review system provides the optimal solution. Members of medical staffs have both the expertise and familiarity with the facilities, physicians and other health care providers involved necessary to ferret out problems and take corrective action. With the promise of confidentiality, physicians and other health care providers under review are also free to explain their perspectives on problem cases and contribute to a constructive dialogue.

Thus, like many states, the California Legislature and the Department of Health Services (DHS) require, as a condition of licensure, that each California hospital have an organized, self-governing medical staff, which is responsible for performing a number of quality assurance functions. (Business and Professions Code § 2282; Health

& Safety Code § 1250; 22 California Code of Regulations ("C.C.R.") §§ 70701(a)(1)(F), 70703(a).) Medical peer review is thus crucial in three major areas: (1) credentialing, (2) quality assessment, and (3) ongoing corrective action.

1. Credentialing. The medical staff is responsible for protecting the quality of patient care through the credentialing of medical staff applicants and members. Credentialing is a process through which the training and experience of applications/reapplicants for clinical privileges are scrutinized in order to assure the initial and on going competence of every physician, dentist, podiatrist and, in some cases, clinical psychologist who is granted privileges to practice in the hospital, *See generally, Unterthiner v. Desert Hospital District*, 33 Cal.3d 285, 188 Cal.Rptr. 590 (1983). In California, this process must include "formal procedures for the evaluation of staff applications and credentials, appointments reappointments, assignment of clinical privileges, appeal mechanisms and such other subjects or conditions which the medical staff and governing body deem appropriate." 22 C.C.R. § 70703(b). Furthermore, these credentialing procedures msut be:

> [D]esigned to ensure the achievement and maintenance of high standards of professional ethical practices including provision that all members of the medical staff be required to demonstrate their ability to perform surgical and/or other procedures competently and to the satisfaction of an appropriate committee or committees of the staff, at the time of original application for appointment to the staff and at least every two years thereafter. (22 C.C.R. § 70701(a)(7).)

2. Quality Assessment. Equally important as its credentialing responsibility is the medical staff's responsibility to continuously monitor the quality of care rendered in the hospital. California hospital licensing regulations specifically require that the medical staff maintain one or more committees formally organized to monitor the care and treatment rendered to hospitalized patients. (22 C.C.R. § 70203(d).) For example, the medical staff is obligated to perform the following patient care review functions on a regular basis:

a. Medical Records Review: the evaluation of medical records for their timely completion and adequate reflection of the patient's condition and treatment which is necessary to ensure that others will be able to assume the patient's care if required. (22 C.C.R. §§ 70703(d), 70749 and 70751.)

b. Surgery Review: the evaluation of surgeries performed to determine whether the surgery was both indicated and properly executed. (22 C.C.R. §§ 70703(d) and 70223(b),(h).)

c. Utilization Review: the evaluation of the allocation of the hospital's health care resources to monitor and address overutilization, underutilization and inefficient scheduling. (22 C.C.R. § 70703(d).)

d. Infection Control and Antibiotic Usage Review: the evaluation of the clinical use of antibiotics and the ongoing prevention, surveillance, and control of infections from whatever source, throughout the hospital. (22 C.C.R. §§ 70703(d) and 70739.)

e. Pharmacy and Therapeutics Review: the evaluation of pharmacy and therapeutics

practice and the development of a drug formulary and policy relating to the safe handling, distribution, and administration of drugs. (22 C.C.R. §§ 70703(d) and 70263.)

f. **Interdisciplinary Practice Committee:** the development of written "standardized procedures" and supervision requirements which permit nurses and physicians' assistants to perform extended functions in the hospital. (Business and Professions Code § 2725; 22 C.C.R. §§ 70706 *et seq.*)

g. **Clinical Laboratories/Radiology/Anesthesiology Review:** the evaluation and the development of procedures governing clinical laboratory, radiology and anesthesiology practice. (22 C.C.R. §§ 70233, 70243, and 70253.)

h. **Disaster Planning:** the development of a written disaster and mass casualty program. (22 C.C.R. § 70741.)

i. **Hospital Safety Planning:** the development of a written program to deal with internal disasters such as fires. (22 C.C.R. §§ 70743, 70745 and 70746.)

j. **Continuing Education:** the development of and participation in a mandatory, ongoing program of continuing education addressing the problems discovered during the foregoing patient care review activities. (22 C.C.R. § 70703(g).)

3. **Corrective Action.** The medical staff also engages in ongoing monitoring of each medical staff member and takes appropriate action, where necessary, to correct or address any problems which might pose a danger to patients. Thus, if in the course of its credentialing or

patient care review activities, the medical staff has reason to believe that a medical staff member may pose a danger to patients, the medical staff will conduct an investigation. Appropriate medical staff departments or committees, including committees with special expertise in dealing with substance abuse or physical or mental impairment, are generally readily available to provide appropriate education or other rehabilitation. In the vast majority of cases, this process allows the medical staff to identify and resolve problems before any patient harm occurs. Where such intervention is not successful, or the medical staff is otherwise of the opinion that the physician or other health care provider should have his or her privileges to practice in the hospital restricted or revoked, a formal hearing process is typically necessary.

These activities, and by implication the necessity of the discovery immunity, are aptly described by one California appellate court as follows:

> These committees perform investigations of physicians applying for staff privileges, establish standards and procedures for patient care, audit each surgery performed, and investigate discrepancies between preoperative and postoperative diagnoses. *The committees compile records and evaluations and engage in frank discussions about the performance and competence of their peers.* Should the committee find a peer to be incompetent, a report and recommendation is made to administrators, who may then take action to revoke, limit, or deny medical staff privileges.

California Eye Institute v. Sup. Ct., 215 Cal.App.3d 1477, 264 Cal.Rptr. 83 (1989), quoting Comment, 24 *Santa Clara L. Rev.* 661, 670, emphasis added.

California is not unique in its recognition and use of comprehensive medical staff quality assurance programs as outlined above. While this is the system in place in the state in which this case arose, similar laws, regulations, or accreditation standards mandate similar peer review activity in most of the nation's hospitals. Indeed, the standards established for the accreditation of hospitals nationally by the Joint Commission impose virtually identical requirements for medical peer review. *See* JCAHO *Comprehensive Accreditation Manual for Hospitals* (1999). Similar peer review activities are also mandated by Congress as a condition for payment under Medicare (42 U.S.C. § 1395x (e) and (k)) and Medicaid (42 U.S.C. § 1396a(a)(9)(A), (19), (26)).

It is important to note that organized medical staff peer review, as prescribed in the JCAHO Standards and as accomplished in California and throughout the nation, was initiated as a *voluntary* activity.[6] The present JCAHO program began as a physician-sponsored effort, under the auspices of the American College of Surgeons, in 1918. Then, as now, the purpose of this activity has always been "the right care of the sick and the injured." Then, as now, the vast majority of medical peer reviewers devote untold

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[6] Nor is medical peer review limited to the hospital setting. Professional medical associations such as those participating as *amici* in this case also engage in medical peer review activity of critical importance to the delivery of quality health care, especially with respect to medical care provided in outpatient facilities or other situations in which the hospital medical staff is unable to provide appropriate review and feedback. These associations also play an important role in defining and monitoring professional ethics, another aspect of professional self-regulation which depends upon confidentiality.

hours of time and attention to this function, without any compensation whatsoever. These activities are performed in most cases by committees who meet early in the mornings, over the lunch hour, in the evenings, or on weekends as necessary to get the job done. It is detailed, demanding and often unpleasant work (e.g., when a physician's privileges to practice medicine in the hospital must be denied or restricted because the physician is unqualified or incompetent). In our litigious society, participation in the quality assurance/peer review process is fraught with legal peril as well. Statutory encouragement and protection of medical staff peer review has rightly followed.

D. The Quality of Emergency Medicine in This Country Will Suffer if Peer Review Records Can Be Obtained in Any Malpractice Claim filed as a Federal EMTALA Case.

Emergency medicine in many states constitutes the critical "safety net" for indigent patients as well as the working poor.[7] Peer review in this very difficult medical specialty is essential to maintain high quality medical services. Emergency physicians will be much less likely to engage in meaningful peer review activities knowing

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[7] Medicaid Access Group, *Access of Medicaid Recipients to Outpatient Care*, 330 New Eng. J. Med. 1426, 1430 (1994) (noting that many poor people have nowhere else to go other than hospital emergency departments); Robert S. Stern et al., *The Emergency Department as a Pathway to Admission for Poor and High-Cost Patients*, 266 JAMA 2238, 2238 (1992) ("Patients with lower socioeconomic status are more likely than other patients to use the emergency department as their means of access to the hospital.").

that a bad outcome in a case requiring review may also serve as the basis for a later malpractice case denominated as an EMTALA violation, in which their peer review efforts may be used against their hospital and peers, and about which they themselves may be deposed or called to the witness stand.

Nor are emergency medicine physicians the only ones who work in the emergency department. In the instant case, Dr. Schug is a family practice physician who works in the emergency room. Many specialties of physicians work in the emergency department, either covering emergency department shifts or serving "on-call" to the emergency department and responding to an emergency physician's request for help on a complex case. *Amici* have noted an increased difficulty in maintaining on-call specialty physician back-up panels in this country due primarily to poor or no compensation from either the patients or the managed care companies involved. An additional blow to the confidentiality of peer review records and information by permitting plaintiffs access through the "back door" of federal EMTALA claims can only further reduce the willingness of *all* physicians to serve "on-call" in emergency departments around the country.

As evidenced by the participation of *amici* representing a broad swath of the health care community, this case is of great national importance. For the foregoing reasons, as well as the reasons outlined in Dr. Schug's Petition for Writ of Certiorari, *amici* strenuously support the Petition in this case so the Court can make a reasoned judgment regarding the creation of a federal medical peer review privilege applicable in civil actions such as this or, in the

alternative, the application in federal court of state statutes protecting medical peer review information from discovery as a matter of comity.

Respectfully submitted,

CATHERINE I. HANSON
221 Main Street, P.O. Box 7690
San Francisco, California 94120-7690

Attorney for: California Medical Association California Academy of Family Physicians California Healthcare Association American College of Emergency Physicians and its California Chapter American Medical Association on its own behalf and on behalf of 45 State Medical Associations Joint Commission on Accreditation of Healthcare Organizations